Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1997

INO INO, INC., RHONDA REMUS, ESMERALDA SILVA, VICTORIA MCKNIGHT, and DEJA VU-BELLEVUE, INC.,

Petitioners,

v.

CITY OF BELLEVUE, WASHINGTON,

Respondent.

On Petition For Writ Of Certiorari To The Washington Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The first question presented is whether, in a federal civil rights action filed in state court, Title 42 United States Code § 1988, which allows attorney's fees to defendants only when plaintiff's claim is found to be frivolous, unreasonable or groundless, preempts Washington's equitable rule which permits recovery of attorney fees by defendants whenever they prevail in having a temporary restraining order or preliminary injunction dissolved, regardless of the potential merit of the plaintiff's claims.

The second question presented is whether, in a federal civil rights action filed in state court, the Washington Supreme Court acted in a manner contrary to prevailing federal authority when it held that Petitioners were not entitled to an award of attorney's fees under Title 42 United States Code § 1988, because the claim on which they prevailed was decided on state constitutional grounds rather than under the federal constitution.

LIST OF PARTIES

The parties to the proceedings below were the Petitioners herein and the City of Bellevue.

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OPINION AND ORDERS BELOW

The opinion of the Washington State Supreme Court is reported as *Ino Ino, Inc. v. Bellevue*, 132 Wn.2d 103, 937 P.2d 154 (1997). An Order Changing Opinion was filed on August 21, 1997, under Washington Supreme Court docket numbers 62941-2, 62939-1, and 62940-4. Petitioners' Motion for Reconsideration to the Washington State Supreme Court was denied on August 21st, 1997, under Cause No. 62941.

BASIS OF THIS COURT'S JURISDICTION

The decision of the Washington Supreme Court was entered on May 1, 1997. An Order changing the opinion was filed, and the Motion for Reconsideration was denied, on August 21, 1997. This petition is timely filed because it is filed within ninety days of denial of the Motion for Reconsideration. This Court's certiorari jurisdiction is invoked pursuant to Title 28 United States Code § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Title 42 United States Code § 1983 provides in part:

> Every person who, under color of law of any statute, ordinance, regulation, custom or usage, of any state or territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or

> immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Title 42 United States Code § 1988 provides in part:

> In an action or proceeding to enforce a provision of Section 1977, 1978, 1980, and 1981 of revised statutes [Title 42 U.S.C Sections 1981, 1982, 1983, 1985 and 1986], Title IX of Public Law 92-318 110 U.S.C. Sections 1681, et seq.] or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code or Title VI of the Civil Rights Act of 1964 [42 U.S.C. Section 2000], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

U.S. Const. amend. 1 provides:

> Congress shall make no law . . . abridging the freedom of speech or of the press . . .

U.S. Const. art. VI, cl. 2. (the "supremacy clause") provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land.

Washington Constitution art. 1, sec. 5 provides:

> Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right.

In addition, the following statutes and rules were involved in the decision below from which Petitioners

seek relief: Washington Superior Court Civil Rule 65, and City of Bellevue Ordinance 4735. These provisions are set forth in full in the Appendix to this petition.

STATEMENT OF THE CASE

Petitioner Ino Ino, Inc. is a Washington Corporation which operated an adult cabaret in the City of Bellevue, Washington known as Papagayo's, which featured nude and semi-nude dancing. Petitioners Rhonda Remus, Esmeralda Silva, and Victoria McKnight, worked as entertainers at the cabaret operated by Ino Ino, Inc. Petitioner Deja Vu-Bellevue is a Washington Corporation which was in the process of opening a new adult nightclub in Bellevue, when the City enacted its Adult Cabaret Licensing Ordinance.

Petitioner Ino Ino and Petitioners Remus, Knight and Silva filed separate lawsuits, one on behalf of the cabaret and one on behalf of the entertainers, challenging the constitutionality of the City of Bellevue's recently enacted Adult Cabaret Licensing Ordinance. A third lawsuit challenging the ordinance was filed by Deja Vu-Bellevue, Inc. The ordinance regulates various aspects of adult cabarets by establishing minimum illumination standards, operating hours for cabarets, licensing requirements for cabaret operators, managers, and dancers, stage configuration requirements, restrictions on the contents of outdoor signage, and minimum distance requirements between patrons and dancers. The lawsuits were filed in state court and sought injunctive and declaratory relief and

damages under Title 42 United States Code § 1983. Petitioners alleged violations of their federal and state constitutional rights to freedom of expression, due process of law and privacy. In their complaints, Petitioners requested an award of attorney fees pursuant to Title 42 United States Code § 1988. All three lawsuits were assigned to the same trial court for a hearing on their motion for a temporary restraining order, and their motion for a preliminary injunction.

On February 24, 1995, the King County Superior Court issued a temporary order restraining Bellevue from enforcing that portion of the ordinance which required entertainers to perform four feet away from the patrons. In all other respects, the motion for a temporary restraining order was denied.

A hearing on the motion for a preliminary injunction was commenced on March 13, 1995. Prior to the hearing, the Petitioners moved for consolidation of the motion for a preliminary injunction with trial on the merits and the motion was granted. At the conclusion of the evidence, the trial court dissolved the temporary restraining order and denied the motion for a preliminary injunction. The trial court upheld all of the challenged provisions of the Bellevue Ordinance except for a provision regulating outdoor signage, which it found unconstitutionally overbroad.

Following the decision on the constitutionality of the Ordinance, Bellevue moved for an award of attorney's fees pursuant to the rule established in the Washington case law, that a defendant is entitled to fees in the event

that a temporary restraining order is dissolved. Petitioners filed a written objection to this award on the grounds that their claim was not frivolous and that the Washington case law allowing for an award of fees under these circumstances is preempted by Title 42 United States Code § 1988.[1] The trial judge overruled this objection and awarded attorney's fees to the City for dissolving the temporary restraining order, but limited the award to the amount of the $5,000 bond.[2] The trial court did not make a finding that Petitioner's claims were frivolous, unreasonable or groundless. The trial judge declined to award the cabarets and the dancers any attorney fees although they prevailed on one of their claims.

The City appealed that portion of the trial court's d cision declaring the sign ordinance unconstitutional and the Petitioners cross appealed. All the appeals were consolidated and were heard by the Washington Supreme Court. In the cross appeal, the Petitioners assigned error to the trial court's award of attorney's fees on the ground that the Washington case law allowing for an award of attorney's fees for improper issuance of a temporary restraining order is preempted by the standard for awarding attorney's fees under Title 42 United States Code § 1988.[3] Petitioners sought reversal of the trial court's decision and requested an award of attorney's

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[1] A true and correct copy of the written objection is contained in the appendix to this petition.

[2] The trial court's order awarding fees is contained in the appendix.

[3] The portion of the Petitioners' appellate brief discussing this assignment of error is contained in the appendix.

fees pursuant to Title 42 United States Code § 1988, in the event that they prevailed on appeal.

With one exception, The Washington Supreme Court majority ruled that all of the challenged provisions of the Ordinance were constitutional on both state and federal constitutional grounds. *Ino Ino, Inc. v. Bellevue,* 132 Wn.2d at 108 through 146. The Washington Supreme Court ruled that the provision in the Ordinance requiring a fourteen day waiting period prior to the issuance of a manager's license was a prior restraint on freedom of speech, and therefor invalid under Article 1, Section 5 of the Washington Constitution. 132 Wn.2d at 122, 123. The Washington Supreme Court rejected Petitioner's challenge to the award of attorney's fees to the City although the majority opinion did not specifically discuss the preemption claim. 132 Wn.2d at 142 through 145. However, the preemption claim was discussed by the dissent. 132 Wn.2d at 157-160. The Washington Supreme Court declined to limit the City's award to the amount of the bond and awarded all the fees that were incurred by the City in the hearing on the motion for a preliminary injunction. 132 Wn.2d at 144. The Washington Supreme Court declined to award any attorney fees to the Petitioners although it found that they prevailed on one of their claims, because the basis for their doing so was state rather than federal constitutional law. 132 Wn.2d at 145.

REASONS FOR GRANTING THE WRIT

The Washington Case Law Allowing Attorney's Fees to the Defendant, Conflicts With the Decisions of This Court, and Purposes of the Congress in Enacting Title 42 United States Code § 1988, and Is Therefor Pre-empted By Prevailing Federal Law.

In awarding fees to the Defendant, the Washington Supreme Court relied on the equitable rule that a party is entitled to recover fees for dissolving a preliminary injunction or a restraining order. *Ino Ino, Inc. v. Bellevue*, 132 Wn.2d at 143. Washington case law provides that a prevailing defendant may recover reasonable attorneys fees incurred in dissolving a "wrongfully issued" injunction. *Alderwood Associates*, 96 Wn.2d 230, 247, 635 P.2d 108 (1981); *Cecil v. Dominy*, 69 Wn.2d 289, 291-292, 418 P.2d 233 (1966). The purpose of the rule is to deter plaintiffs from seeking relief prior to trial on the merits. *White v. Wilhelm*, 34 Wn. App. 763, 773-774, 665 P.2d 407 (1983). Under the Washington cases, an injunction is deemed to be "wrongfully issued" if it is eventually dissolved rather than upheld or made permanent. *Cecil v. Dominy*, 69 Wn.2d at 291-293, 418 P.2d 233 (1966). Recovery of fees is allowed up to the point the injunction gets dissolved. *Ritchie v. Markley*, 23 Wn. App. 569, 575, 597 P.2d 449 (1979). The amount of fees is left to the discretion of the trial court. *Ino Ino, Inc. v. Bellevue*, 132 Wn.2d at 143.

Thus, under the Washington case law, a defendant who succeeds in dissolving a temporary restraining order or preliminary injunction is awarded fees regardless of the potential merit of the plaintiff's claim, and a plaintiff seeking preliminary injunctive relief runs the substantial

risk of being saddled with an attorney's fee award, if he or she later does not prevail at trial. This is in sharp conflict with federal decisions dealing with awarding fees to prevailing defendants under § 1988.

A prevailing defendant may not recover attorney fees under Title 42 United States Code § 1988 absent a judicial finding that the suit was vexatious, frivolous, or brought to harass. *Hensley v. Eckerhart*, 461 U.S. 424, 429, 444 and n.2, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983). *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 422; 54 L. Ed. 2d 648, 98 S. Ct. 694 (1978). *Vernon v. Los Angeles.*, 27 F.3d 1385, 1402 (9th Cir. 1994); *Davis v. City of Charleston*, 917 F.2d 1502, 1503 (8th Cir. 1990). The rationale for this rule was explained by this Court in *Christiansburg Garment Co., supra*. In enacting the fee shifting provisions, Congress wanted to make it easier for a plaintiff of limited means to bring civil rights cases, but at the same time discourage frivolous lawsuits. 434 U.S. 421, 422. However, to award fees to the defendant simply because the plaintiff did not prevail would undermine the central purpose of the fee shifting statute. Writing for the Court in *Christiansburg*, Justice Stewart stated:

> To take the further step of assessing attorney's fees against plaintiffs simply because they do not prevail would substantially add to the risks inhering in most litigation and *would undercut the efforts of congress to promote the vigorous enforcement of Title VII*. Hence, a plaintiff should not be assessed fees unless a court finds that his claim was frivolous, unreasonable or groundless, or that the plaintiff continued to litigate after it clearly became so.

434 U.S. at 422 (emphasis supplied).

The Washington case law also sharply conflicts with the purpose of the Congress as expressed in the legislative history. Section 1988 was enacted in 1976 in response to the Supreme Court's decision in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 44 L. Ed. 2d 141, 95 S. Ct. 1612 (1975), which held that only Congress can determine which laws are important enough to justify the awarding of attorney's fees under the "private attorney general" principle. The legislative history of § 1988 clarifies that Congress believed that the awarding of attorney's fees is critical to the enforcement of the civil rights laws. The House Report, H.R. Rep. No. 1558, 94th Cong., 2d Sess. (1976) states:

> The effective enforcement of Federal civil rights statutes depends largely on the efforts of private citizens. Although some agencies of the United States have civil rights responsibilities, their authority and resources are limited. In many instances where these laws are violated, it is necessary for the citizen to initiate action to correct the illegality. Unless the judicial remedy is full and complete, it will remain a meaningless right. Because a vast majority of the victims of civil rights violations cannot afford legal counsel, they are unable to present their cases to the courts.

Similarly, the Senate Report, S. Rep. No. 94-1011, 94th Cong., 2d Sess. (1976) states:

> If private citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court.

The Senate report also quotes with approval from *Newman v. Piggie Park*, 390 U.S. 400, 402, 88 S. Ct. 964, 966, 19 L. Ed. 2d 1263, 1265-66 (1968), which addresses the importance of injunctions in civil rights actions:

> When a plaintiff brings an action under (Title II) he cannot recover damages. **If he obtains an injunction, he does so not for himself alone but also as a "private attorney general," vindicating a policy that Congress considered of the highest priority.** If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the Federal courts. Congress therefore enacted the provision for counsel fees (42 U.S.C.A. 2000-3(b)) to encourage individuals injured by racial discrimination to seek judicial relief under Title II. Senate Report at 3, USCA at 5910.

In the congressional debates over the § 1988 legislation, Congressman Seiberling stated:

> If the law does not authorize the awarding of attorneys' fees in meritorious civil rights cases, many potential plaintiffs will be deterred from bringing deserving cases to remedy violations of the Constitution, **especially those cases in which the appropriate relief is primarily equitable or injunctive rather than monetary.** 122 Cong. Rec. H 12164-65 (Daily ed. Oct 1, 1976).

The Congressional intent in enacting § 1988 was clearly focused on creating the right to attorney fees for prevailing plaintiffs in civil rights cases. Congress wanted to make it feasible for "private attorneys general" to halt civil rights violations. The Sixth Circuit recognized that

another major purpose of § 1988 was to encourage suits in new or undeveloped areas of civil rights law. *Northcross v. Board of Education*, 611 F.2d 624 (6th Cir. 1979), *cert. denied*, 447 U.S. 911 (1980). It is also apparent from the legislative history quoted above that Congress wanted to encourage plaintiffs to seek injunctive relief, in appropriate cases, by providing a monetary incentive, which would not otherwise exist in actions not involving a claim for damages. This is in stark contrast to the policy behind Washington's equitable rule which is to discourage plaintiffs from seeking injunctive relief.

Petitioners maintain that because of the conflict between the decisions of this Court, the Congressional purpose in adopting § 1988, and Washington's equitable rule allowing a recovery of fees by defendants whenever they succeed in dissolving a temporary restraining order, the Washington rule is preempted. Federal preemption doctrine derives its ultimate authority from the Supremacy Clause (Article 6) of the U.S. Constitution:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land.

U.S. Const. art. VI, cl. 2.

If Congress indicates an intent to occupy a given field, any state law falling within that field is preempted, and where Congress has not clearly indicated an intent, state law is still preempted where it actually conflicts with federal law. *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 120 L. Ed. 2d 73, 84, 112 S.Ct. 2374 (1992). Where Congressional intent is not made clear through explicit preemptive language, the intent to supersede

state law may be implied if: 1) a scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it; 2) if the federal act touches a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject or; 3) if the goals sought to be obtained reveal a congressional purpose to preclude state authority. *Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597, 115 L. Ed. 2d 532, 111 S. Ct. 115 L. 2746, 2481 (1991). Where Congress has not occupied an entire field, preemption may still occur where state and federal law actually conflict. Actual conflict occurs when compliance with both laws is physically impossible, or when a state law stands as an obstacle to the accomplishment of the purposes and objectives of Congress. *Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. at 605. Another indicia of whether preemption will invalidate a state statute, rule, or action is whether conduct that is meant to be encouraged by a federal statute or regulation is discouraged or frustrated by the state rule. *See e.g., Nash v. Florida Industrial Commission*, 389 U.S. 235, 239, 19 L. Ed. 2d 438, 103 S. Ct. 362 (1967); *Xerox Corp. v. County of Harris*, 459 U.S. 145, 74 L. Ed. 2d 323, 103 S. Ct. 523 (1982).

The policies underlying the Civil Rights Act, Title 42 United States Code § 1983, have been held to be grounds for preempting an otherwise applicable state procedural rule, in civil rights cases brought in state court. In *Felder v. Casey*, 487 U.S. 131, 138, 101 L. Ed. 2d 123, 108 S. Ct. 2302 (1988), this Court held that the State of Wisconsin could not rely on a notice of claim statute to bar a Civil Rights Act claim that was filed in state court because,

"where the states entertain a federally created cause of action the federal right cannot be defeated by local practice." The Court held that the requirements of the Wisconsin notice of claim statute were preempted as inconsistent with federal law, in part because they amounted to an exhaustion requirement, which has been held not to apply to Civil Rights Act cases. Writing for the majority in *Felder*, Justice Brennan stated:

> In enacting § 1983, Congress entitled those deprived of their civil rights to recover full compensation from governmental officials responsible for those deprivations. A state law that conditions that right of recovery upon compliance with a rule designed to minimize governmental liability, and that directs injured persons to seek redress in the first instance from the very targets of the federal legislation, is inconsistent with both the purpose and the effect with the remedial objectives of the federal civil rights law. Principles of federalism as well as the Supremacy Clause dictate that such state law must give way to vindication of the federal right when that right is asserted in state court.

487 U.S. 153.

In a similar vein, lower courts have held that procedural rules similar to Washington's fee shifting provision are preempted by the policies underlying § 1988. In *Varney v. O'Brien*, 147 Mich. App. 397, 383 N.W. 2d 213, 217 (1985), government defendants in a § 1983 suit claimed they were entitled to § 1988 fees because the civil rights plaintiff had rejected a mediation award. Under Michigan law, the plaintiff was therefor required to pay the actual costs of litigation. That plaintiff succeeded on

only one of four claims against defendants, and even then was awarded only $1.00. 383 N.W. 2d at 217. The court classified the issue as "the interplay between a federal statute which awards this plaintiff attorney fees and a local court rule which awards them to the defendants". 383 N.W. 2d at 217, 218. The Court concluded:

> . . . the effectiveness of 42 U.S.C. § 1988 would be undermined if the rejection of a mediation award turned out to be more favorable than the judgment the plaintiff eventually received prevented plaintiff from getting an award of attorney fees . . . *Because Congress through 42 U.S.C. § 1988 has expressed a desire to encourage private enforcement of civil rights, we conclude that the local court rule upon which defendants rely has been preempted and, therefor, defendants are not entitled to recover any fees.*

Id. (emphasis supplied).

Similarly, in *East-Bibb Twiggs Neighborhood Ass'n v. Macon-Bibb Planning and Zoning Comm'n*, 674 F. Supp. 1475, 1477 (M.D. Ga. 1987), aff'd, 888 F.2d 1576 (11th Cir. 1989), the federal district court dismissed a defendant's counterclaim for abusive litigation based on state law in a federal civil rights action. The court noted that if state law counterclaims of abusive litigation were allowed to be asserted in federal causes of action, they would have a "tremendous chilling effect on the assertion of these federally created rights." 674 F. Supp. at 1477. The court concluded that the defendant's state law counterclaim did not state a cause of action, "because the underlying dispute arises out of 42 U.S.C. § 1983. 42 U.S.C. § 1988 and Rule 11 provide defendant . . . with the exclusive remedy for abusive litigation . . . " *Id.*

By enacting § 1988, Congress intended to encourage private parties, including those with modest means, to pursue civil rights claims, to seek and obtain injunctive relief where appropriate, and to encourage suits in new or undeveloped areas of civil rights law. All of these goals are frustrated by Washington's equitable rule which is expressly intended to dissuade plaintiffs from pursuing injunctive relief. One of the obvious goals of Washington Civil Rule 65, which is identical to Federal Rule 65, is to preserve the fruits of the litigation, pending trial on the merits. In a number of instances, if plaintiffs are unable to obtain the temporary relief afforded by Rule 65, they may be disinclined to pursue the litigation at all. Furthermore, under the Washington Rule, plaintiffs are discouraged from pursuing novel claims, because, as this Court pointed out in *Christiansburg Garment Co. v. EEOC*, in rejecting the suggestion that fees be awarded to defendants whenever they prevail, "This kind of hindsight logic could discourage all but the most airtight claims, for seldom can a prospective plaintiff be sure of ultimate success". 434 U.S. at 422. Finally, the threat of a huge attorney's fee award would be sufficient to scare off most "private attorneys general", and particularly those of modest means, because they might prevail in the early stages of the litigation, but then not succeed in the trial on the merits. Under the cases cited above, the Washington rule awarding attorney's fees to prevailing defendants regardless of the potential merit of plaintiff's claim is preempted by § 1988, because the state law imposes a direct obstacle to the accomplishment of the goals and objectives of the Congress.

The Washington Supreme Court Ignored Established Federal Precedent When It Ruled That Title 42 United States Code § 1988 Provides for An Award of Attorney Fees to a Prevailing Plaintiff Only If the Basis of the Claim Is Federal Law.

Citing to *Snohomish County v. Anderson*, 124 Wn.2d 834, 881 P.2d 240 (1994), the Washington Supreme Court majority opinion incorrectly held that a prevailing plaintiff in a § 1983 suit may only recover attorney fees if the claim prevailed upon is federal:

> In this case, Respondents meet the low threshold for prevailing party status because they succeed on their prior restraint challenge to the 14-day delay in issuing manager's licenses. However, 42 U.S.C. sec. 1988 provides for an award only if a party's rights under the federal constitution or federal law are violated.

Ino Ino, Inc. v. Bellevue, 132 Wn.2d at 145-146.

The case cited for this proposition, *Anderson, supra*, does not remotely support the proposition it is cited for, and conflicts with this court's holding in *Maher v. Gagne*, 448 U.S. 122, 65 L. Ed. 2d 653, 100 S. Ct. 2579 (1980). *Anderson* involved a situation where citizens asserting several state claims and a violation of Title 42 United States Code § 1983 failed to actually state a cause of action under the federal statute because they did not demonstrate how the action complained of, if true, would be a civil rights violation:

> This provision (42 U.S.C. sec. 1983) has been consistently interpreted to permit a cause of action only for violation of the federal constitution or other federal laws; violation of state laws

> alone will not support a violation of 42 U.S.C. sec. 1983.

124 Wn.2d at 843, 844.

Anderson does not concern whether § 1988 fees may ever be awarded on a pendent state claim in a case filed under Title 42 United States Code § 1983; *Anderson* concerns whether a federal cause of action had been properly asserted under § 1983.

In *Maher v. Gagne*, this court affirmed a Court of Appeals decision which stated:

> We think it is within Congress' Fourteenth Amendment power to authorize a fee award when a party prevails on a statutory claim as long as the pendent constitutional claim is a substantial one and arises out of the same operative facts. Such a fee award furthers the Congressional goal of encouraging suits to vindicate constitutional rights without undermining the long standing judicial policy of avoiding unnecessary decision of important constitutional issues. 594 F.2d 336, 342-343, cited at 448 U.S. 127, n.9, 100 S. Ct. at 2574, n.9 (1980).

A number of the federal circuits have held that when a party files a cause of action under a federal statute covered by § 1988 and also files a pendent state law claim which is dispositive in favor of the plaintiff, the Act may nonetheless entitle the prevailing party to attorneys' fees. *Exeter-West Greenwich Regional School District v. Pontarelli*, 788 F.2d 47, 50-51 (1st Cir. 1986); *Milwe v. Cavuoto*, 563 F.2d 80 (2nd Cir. 1981) (affirming fee award under 1988 where damages awarded only on pendent state law assault claim); *Gates v. Collier*, 616 F.2d 1268, 1275 (5th Cir.

1980); *Seals v. Quarterly County Court*, 562 F.2d 390 (6th Cir. 1977) (reversing denial of attorneys fees where Plaintiff prevailed only on a pendent state law claim); *Bond v. Stanton*, 555 F.2d 172 (7th Cir. 1977); *Robert M. v. Benton*, 671 F.2d 1104, 1106 (8th Cir. 1992) (award of attorney fees proper where plaintiff prevails upon state law claim which arises out of same set of facts as a substantial constitutional claim under Section 1983); *Southeast Legal Defense Group v. Adams*, 657 F.2d 1118 (9th Cir. 1981).

In sum, plaintiffs who file legitimate claims under Title 42 United States Code § 1983 but who prevail on pendent state law claims, rather than federal constitutional claims, are eligible for an attorney's fee award under § 1988. Petitioners were therefor wrongly denied attorney fees on their successful state law claim.

The Writ Should Be Granted Because the Washington Supreme Court Has Decided Important Federal Questions in a Manner Which Conflicts With Relevant Decisions of This Court.

In allowing fees to a prevailing defendant who succeeds in dissolving a temporary restraining order, regardless of the potential merit of plaintiff's claim, the Washington Supreme Court ruled in a manner that is contrary to this Court's decisions in *Hensley v. Eckerhart, supra*, and *Christiansburg Garment Co. v. EEOC, supra*, not to mention the stated purpose of the Congress in enacting Title 42 United States Code § 1988. In declining to award fees to the Petitioners on the state constitutional claim upon which they prevailed, the Washington Supreme Court not only misconstrued its own prior decision, but decided in a manner that conflicts directly with this

Court's decision in *Maher v. Gagne, supra.* In essence, the Washington Supreme Court has thumbed its nose at prevailing federal law. Moreover, as recognized by the prior decisions of this Court, the fee shifting provisions of § 1988 are intended to operate as an incentive for private plaintiffs to bring civil rights claims, and the rule which Washington has elected to apply in this case will have the opposite effect.

State courts have concurrent jurisdiction with the federal courts over claims arising under Title 42 United States Code § 1983. *Martinez v. California,* 444 U.S. 277, 62 L. Ed. 2d 481, 110 S. Ct. 553 (1980), and the states may not impose procedural obstacles to the judicial resolution of claims arising under the civil rights act. *Felder v. Casey, supra.* By deciding the attorney's fee issue in the manner in which it did in this case, the Washington Supreme Court has announced that henceforth the Washington courts are a less hospitable environment for the pursuit of civil rights claims than the federal courts, at least with respect to those claims which require interim equitable relief.

The decision of the Washington Supreme Court has a potential "chilling effect" not only on the pursuit of legitimate civil rights cases but on the exercise of the underlying substantive constitutional rights. This Court has recognized that the issuance of preliminary injunctions is often necessary to protect the exercise of free speech rights because, "The loss of First Amendment Freedoms for even minimal periods of time, unquestionably constitutes irreparable injury". *Elrod v. Burns,* 427 U.S. 347, 373, 49 L. Ed. 2d 547, 96 S. Ct. 2673 (1976). The threat of attorney's fees being assessed under the Washington rule

will deter some plaintiffs from taking the steps necessary to protect their free speech rights, and it may even deter the speech for lack of an effective remedy.

Finally, the decision of the Washington Supreme Court has potential consequences beyond the boundaries of Washington State because other jurisdictions may be inclined to follow Washington's example and adopt a similar rule.

CONCLUSION

The Petitioners respectfully request that a writ of certiorari be issued to the Washington State Supreme Court.

Respectfully submitted,

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SUPREME COURT OF WASHINGTON

132 Wn.2d 103

[Nos. 62941-2; 62939-1; 62940-4. En Banc.]

Argued May 29, 1996. Decided May 1, 1997.

INO INO, INC., *Respondent*, v.
THE CITY OF BELLEVUE, *Appellant*.

DEJA VU-BELLEVUE, *Respondent*, v.
THE CITY OF BELLEVUE, *Appellant*.

RONDA REMUS, ET AL., *Respondents*, v.
THE CITY OF BELLEVUE, *Appellant*.

ALEXANDER and TALMADGE, JJ., and DURHAM, C.J., dissent inpart by separate opinions; SANDERS and JOHNSON, JJ., dissent by separate opinion.

Nature of Action: Two adult entertainment corporations and three dancers sought the invalidation of several municipal ordinances regulating nude or seminude erotic dancing.

Superior Court: The Superior Court for King county, Nos. 95-2-02025-9, 94-2-22796-3, and 94-2-27797-9, Carol A. Schapira, J., on April 24, 1995, entered a judgment upholding two of the ordinances, invalidating the remaining one, dissolving a temporary restraining order that had prevented the municipality from enforcing its ordinances, and denying a temporary or permanent injunction. The court also awarded attorney fees to the municipality for dissolving the temporary restraining order, but limited the award to the amount of the bond posted by the corporations.

Supreme Court: Holding that the trial court's findings of fact were supported by substantial evidence; that

the municipality's requirements with respect to dancer distance, lighting, club closing hours, and disclosure of personal information by the dancers were valid; that the 14-day period required by ordinance for processing managers' licenses was invalid insofar as temporary licenses could not be issued under the ordinance; that an ordinance prohibiting nude or seminude dancing or the depiction of nude or seminude dancing outside of club premises was valid insofar as it prohibits only the outdoor performance of adult cabaret entertainment or visual images of such entertainment; and that attorney fees were awardable to the municipality for dissolving the temporary restraining order only to the extent of expenses incurred prior to the dissolution of the order; the court *affirms* the judgment in part, *reverses* it in part, and *remands* the case for a determination of the amount of attorney fees to award to the municipality.

Preston, Gates & Ellis, by *Stephen A. Smith* and *Robert B. Mitchell, Jr.*, for appellant.

Gilbert H. Levy; and *Burns & Hammerly, P.S.*, by *Jack R. Burns* and *John L. Carroll, Jr.*, for respondents.

P. Cameron De Vore, Gregory J. Kopta, and *Kraig Baker* on behalf of the Free Speech Coalition, amicus curiae.

MADSEN, J. – At issue in this case are provisions of a Bellevue City ordinance regulating adult cabarets. Two adult entertainment corporations and three dancers (Respondents) challenged the constitutionality of the ordinance under both the First Amendment and WASH. CONST. art. I, § 5. The trial court upheld all but one of the challenged provisions and awarded fees to the City of Bellevue for dissolving a temporary restraining order.

The City of Bellevue (Appellant) appealed and the Respondents cross-appealed. We affirm in part, reverse in part, and remand for a determination of attorneys' fees.

STATEMENT OF THE CASE

In November 1993, the Bellevue City Council adopted Ordinance 4602, the City's first ordinance regulating adult cabarets. Clerk's Papers (CP) at 311 (Ino Ino, Inc., finding of fact 6).[1] The ordinance contained a statement that the City would regulate adult cabarets to prevent "significant criminal activity" that "historically and regularly" has occurred, while preserving constitutionally protected expression. Ordinance 4602 (1993). The City later amended the ordinance by adopting Ordinance 4735 in January 1995, and Ordinance 4745 in March 1995.

The challenged ordinances, codified as Bellevue City Code (BCC) § 5.08, regulate various aspects of adult cabarets. Specifically, BCC § 5.08.010(B) defines "adult entertainment" and thus determines which businesses must comply with the regulations. Section 5.08.070(A)(1) provides that nude or semi-nude dancers must perform on an elevated stage at least eight feet from patrons. According to section 5.08.070(A)(6), dancers performing on the nonstage area of the adult cabaret must be at least

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[1] "Ino Ino Clerk's Papers" refers to clerk's papers submitted in *Ino Ino., Inc. v. City of Bellevue*, No. 95-2-02025-9 and received in the clerk's office on June 26, 1995. "Deja-Vu Clerk's Papers" refers to clerk's papers submitted in *Deja Vu-Bellevue, Inc. v. City of Bellevue*, No. 94-2-22796-3. "Remus Clerk's Papers" refers to clerk's papers submitted in *Remus, et al. v. City of Bellevue*, No. 94-2-27797-9.

four feet from any member of the public. Section 5.08.070(D)(2) establishes a minimum level of lighting; and section 5.08.070(E) requires adult cabarets to close from 2 a.m. to 10 a.m. Section 5.08.040 establishes licensing requirements for operators, managers, and dancers. Section 5.08.070(B)(2) prohibits nude performances or graphic representations of such performances outside of adult cabarets.

Respondents Deja Vu-Bellevue, Inc.; Ino Ino, Inc. (owner of adult cabarets Papagayo's and Babes); and dancers Rhonda Remus, Esmeralda Silva, and Victoria McKnight filed suit to have the ordinances declared unconstitutional. On February 24, 1995, the King County Superior Court issued an order temporarily restraining the City from enforcing the four-foot distance requirement for individual dances in adult cabarets. Under Civil Rule (CR) 65(c), the court required that the adult cabarets post a bond for $5,000. At the request of the adult cabarets and dancers, the court consolidated the preliminary hearing with a trial on the merits under CR 65(a)(2). From March 13 to March 20, 1995, the court heard evidence regarding the manner in which adult cabarets operate in King County.

At trial, Respondents presented evidence that dancers, or entertainers, are independent contractors who pay adult cabarets $65 or more to work a six – to eight-hour shift. An entertainer performs uncompensated nude dances on stage in order to attract the attention of patrons, who can then purchase individual performances near their tables and couches, hence the term "table dance" or "couch dance." CP at 313, 316 (Ino Ino, Inc. findings of fact 11, 23). Entertainers receive their income

from the individually compensated dances. Under this system, numerous dancers may perform simultaneously throughout the cabaret, but they are prohibited from engaging in sexual contact with patrons. BCC § 10A.88 ("Offenses Against Public Morals").

Individual Respondents testified that patrons would be unwilling to pay for table dances that complied with the new restrictions on distance and lighting. These restrictions would detract from the intimacy that is part of the message in table dances. Corporate Respondents presented evidence that compliance with the four-foot minimum distance rule would hurt them economically to the point of shutting down their businesses, and thus would restrict constitutionally protected speech. Respondents made this prediction on the assumption that the ordinance required at least four feet between the patrons' and dancers' outstretched arms (or about eight to nine feet between torsos).

At the conclusion of the evidence, the trial court dissolved the temporary restraining order and denied a temporary or permanent injunction. The court upheld all of the provisions of the Bellevue ordinances except the outdoor prohibition in BCC § 5.08.070(B)(2), which the court struck down as overbroad. The court awarded the City attorneys' fees for dissolving the temporary restraining order, but limited the award to the amount of the bond. The court declined to award the adult cabarets and the individual dancers attorneys' fees under 42 U.S.C. § 1988 (1994).

DISCUSSION

I

Trial Court's Findings of Fact

Initially, Respondents challenge several of the trial court's findings of fact. An appellate court must affirm a trial court's findings of fact if they are based on live testimony and supported by substantial evidence. *Bering v. Share*, 106 Wn.2d 212, 220-21, 721 P.2d 918 (1986), *cert. dismissed*, 479 U.S. 1050 (1987). Substantial evidence exists when the record contains evidence of sufficient quantity to persuade a fair-minded, rational person that the declared premise is true. *World Wide Video, Inc. v. City of Tukwila*, 117 Wn.2d 382, 387, 816 P.2d 18 (1991) (quoting *Bering*, 106 Wn.2d at 220), *cert. denied*, 503 U.S. 986 (1992).

In this case, the trial court found that illegal exposure and sexual contact occurred at adult cabarets. These findings were based on testimony from Bellevue police officers who had performed undercover investigations and communicated with officers from surrounding jurisdictions. The Bellevue officers reported numerous instances of improper sexual conduct at Babes and Papagayo's.

Some entertainers rubbed their buttocks into the groin areas of undercover officers. Others fondled customers' genitals or exposed their breasts and genitals during individual dances. Based upon the officers' testimony, the trial court also found that low lighting and close proximity between patrons and dancers hindered the officers' ability to detect violations that may have been occurring elsewhere in the club.

The court found further that the City had enacted the ordinances in order to control the illegal exposure and sexual contact, or "secondary effects," of live adult entertainment. CP at 314 (Ino Ino, Inc., finding of fact 15). The court based this finding on the testimony of an Assistant City Attorney who had drafted the four-foot rule and former city council members who had voted for its adoption. According to their testimony, they had intended that this provision place patrons and dancers just out of arm's reach.

The trial court also found that the distance restrictions did not prevent patrons from perceiving the eroticism of the dancers' performances. With respect to the restriction for stage dances, the court found that patrons can receive a dancer's erotic message even when they are 8 to 40 or more feet away from the stage. Increasing the minimum distance between patrons and stage dancers from six feet to eight feet resulted only in a loss of some seating.

With respect to the restriction for table dances, the trial court found that a dancer can convey eroticism from a distance of four feet from the patron's torso. Based upon a dance expert's testimony, the court found that the four-foot rule allowed a patron to see the dancer's entire body and expressive activity. The trial court also found that Papagayo's had not complied with the City's four-foot restriction on table and couch dances. Moreover, the adult cabaret, Babes, which was owned by Respondent Ino Ino, Inc., had eliminated individual dances rather than comply with the four-foot rule.

Based on the record, we hold that substantial evidence supports the challenged findings and accordingly affirm the trial court's findings of fact.

II

Constitutionality of Bellevue's Adult Entertainment Ordinances

Respondents next challenge the trial court's conclusion that the provisions of Bellevue's ordinances, with the exception of BCC § 5.08.070(B)(2), restrict only conduct, and that even if they restrict expression they permissibly regulate only the time, place, or manner of expression. Respondents claim that the ordinances violate the federal and state constitutions. Respondents also argue that the expressive element of nude dancing is entitled to broader protection under the Washington Constitution. Because Respondents' primary argument centers on the state constitution we begin there.

An appellate court reviews issues of law de novo. *State v. Campbell*, 125 Wn.2d 797, 888 P.2d 1185 (1995). The State bears the burden of justifying a restriction on speech. *Collier v. City of Tacoma*, 121 Wn.2d 737, 753, 854 P.2d 1046 (1993); *Spokane Arcades, Inc. v. Brockett*, 631 F.2d 135, 138 (9th Cir. 1980), *aff'd*, 454 U.S. 1022 (1981). In *State v. Gunwall*, 106 Wn.2d 54, 58, 720 P.2d 808 (1986), we enumerated several nonexclusive criteria which a court should consider to determine whether, in a given situation, it is appropriate to resort to the Washington Constitution for separate and independent state grounds of decision: (1) the textual language; (2) differences in the texts; (3) constitutional history; (4) preexisting state law;

(5) structural differences; and (6) matters of particular state or local concern. The same factors have been analyzed to determine whether the state constitution ultimately provides greater protection than its corresponding federal provision. *State v. Boland*, 115 Wn.2d 571, 575, 800 P.2d 1112 (1990).

As this court noted in *State v. Reece*, "[t]he question to be asked here is not whether the concept of free speech is interpreted more broadly under the state constitution than under the federal constitution. This court has already answered this question in the affirmative." *State v. Reece*, 110 Wn.2d 766, 778, 757 P.2d 947 (1988), *cert. denied*, 493 U.S. 812 (1989). Instead, the inquiry must focus on the specific context in which the state constitutional challenge is raised. Even where a state constitutional provision has been subject to independent interpretation and found to be more protective in a particular context, it does not follow that greater protection is provided in all contexts. *See State v. Russell*, 125 Wn.2d 24, 57, 882 P.2d 747 (1994), *cert. denied*, ___ U.S. ___, 115 S. Ct. 2004 (1995); *State v. Reece*, 110 Wn.2d 766, 777-78, 757 P.2d 947 (1988) (stating that the proper inquiry under *Gunwall* is whether "on a given subject matter" the Washington constitutional provision should give greater protection than the minimum protection afforded by the federal constitution), *cert. denied*, 493 U.S. 812 (1989). Application of this principle has also been evident in this court's interpretation of Const. art. I, § 7. *See, e.g., Bedford v. Sugarman*, 112 Wn.2d 500, 507, 772 P.2d 486 (1989) (noting that art. I, § 7 gives enhanced protection against certain governmental searches and seizures, but declining to consider the extent to which this provision guarantees

a more general right of privacy); *see also Ramm v. City of Seattle*, 66 Wn.App. 15, 27, 830 P.2d 395 (holding that art. I, § 7 offers the same degree of protection as its federal counterpart in matters not involving search and seizure), *review denied*, 120 Wn.2d 1018 (1992).

Thus, in *Reece* we identified the issue as "whether *obscenity* is to be afforded broader protection under the state constitution than under the federal constitution." *Reece*, 110 Wn.2d at 778. We examined the *Gunwall* factors and concluded that in the context of obscenity, art. I, § 5 does not afford broader protection. Similarly, when faced with a challenge to Seattle's telephone harassment law, under art. I, § 5 we found no justification for extending greater protection under the state constitution for speech in nonpublic fora and applied the federal standard. *City of Seattle v. Huff*, 111 Wn.2d 923, 926, 767 P.2d 572 (1989). The federal analysis also applies when confronting art. I, § 5 challenges to regulations of commercial speech. *National Fed'n of Retired Persons v. Insurance Commn'r*, 120 Wn.2d 101, 119, 838 P.2d 680 (1992). In *JJR, Inc.*, we declined to extend the full protection of art. I, § 5 to licensure of nude dancing, observing that nude dancing "clings to the edge of protected expression." *JJR, Inc. v. City of Seattle*, 126 Wn.2d 1, 9, 891 P.2d 720 (1995). Most recently, we reaffirmed that art. I, § 5 extends no greater protection than its federal counterpart when evaluating false or defamatory statements. *Richmond v. Thompson*, 130 Wn.2d 368, 382, 922 P.2d 1343 (1996).

The issue here, then, is whether nude or sexually explicit dancing is to be afforded greater protection under the state constitution than under its federal counterpart.

The first factor to consider in the *Gunwall* inquiry is the text of the state constitution. Article I, § 5 provides that "[e]very person may freely speak, write and publish on all subjects, being responsible for the abuse of that right." This court has interpreted the text of this provision in evaluating time, place, and manner regulations, and claims of prior restraint and overbreadth.

In *Collier,* the court recognized that the "broad language of Const. art. I, § 5" justifies a more protective standard for evaluating governmental restrictions on political speech. *Collier,* 121 Wn.2d at 748. The standard adopted by this court for evaluating time, place, and manner restrictions on speech requires the government to show a compelling state interest. *Id.* at 747; *Bering,* 106 Wn.2d at 234.

Regulations which rise to the level of prior restraints may be subject to an even stricter standard. Holding that the language of art. I, § 5 forbids prior restraints on publication, we have struck down prior restraints in most contexts, allowing only post publication sanctions to punish the abuse of free speech rights. *See, e.g., State v. Coe,* 101 Wn.2d 364, 374-75, 679 P.2d 353 (1984) (holding that the language of art. I, § 5 forbids prior restraints on the publication or broadcast of constitutionally protected speech that was lawfully obtained, true, and a matter of public record). The strict standard for evaluating prior restraints under the state constitution lies in the plain language of CONST. art. I, § 5 which "seems to rule out prior restraints under *any* circumstances." *Bering,* 106 Wn.2d at 242 (quoting *Coe,* 101 Wn.2d at 374). In the context of adult entertainment, however, the court has

declined to afford the full protection of art. I, § 5, observing that nude dancing "clings to the edge of protected expression." *See JJR, Inc.* 126 Wn.2d at 9.

In regard to claims of overbreadth, the text of art. I, § 5 is less tolerant than the First Amendment of overbroad restrictions on expression when such restrictions rise to the level of a prior restraint. *O'Day v. King County*, 109 Wn.2d 796, 804, 749 P.2d 142 (1988).

The broad language of art. I, § 5 has been found to warrant greater protection for speech, both spoken and written, in some contexts. However, it has not previously been applied to extend greater protection to expressive conduct or sexually explicit dance. Moreover, art. I, § 5 mentions only the right to speak, write and publish. In the absence of language relating to expressive conduct, we do not find that the text of art. I, § 5 justifies extending greater protection to the adult performances at issue here.

The second factor to consider is the difference in the texts of the federal and state constitutions. The text of the First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech." U.S. CONST. amend. I. This court has found the difference in text between art. I, § 5 and the First Amendment justifies an independent interpretation as noted above.

With respect to time, place, and manner restrictions, federal courts have interpreted the First Amendment as requiring only a substantial or important state interest. *See City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 50, 106 S. Ct. 925, 89 L. Ed. 2d 29 (applying to time, place, and manner restrictions on pure speech a test requiring a

"substantial" governmental interest), *reh'g denied*, 475 U.S. 1132, (1986); *United States v. O'Brien*, 391 U.S. 367, 377, 88 S. Ct. 1673, 20 L. Ed. 2d 672 (applying to time, place, and manner restrictions on expressive conduct a test requiring an "important or substantial" governmental interest), *reh'g denied*, 393 U.S. 900 (1968).

In contrast, because of its broad language, Const. art. I, § 5 has been interpreted to offer greater protection than the First Amendment in the context of pure noncommercial speech in a traditional public forum. *See Collier*, 121 Wn.2d at 747 (time, place, and manner restriction on political speech in traditional public forum of streets and sidewalks must serve compelling state interest); *Bering*, 106 Wn.2d at 233-34 (time, place, and manner restriction on abortion clinic protest on city streets and sidewalks must meet compelling governmental interest test).

In other contexts, however, this court has followed the federal standard when evaluating time, place, and manner restrictions. *See Huff*, 111 Wn.2d 923; *Reece*, 110 Wn.2d 766; *National Fed'n of Retired Persons*, 120 Wn.2d 101.

In some cases, art. I, § 5 also provides more protection against prior restraints. For example, federal courts have held under the First Amendment that delays in issuing dancers' licenses, but not operators' licenses, constitute a prior restraint.[2] By contrast, in *JJR, Inc.*, we made

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[2] The Ninth Circuit Court of Appeals expressly distinguished between operators and dancers, finding that a five-day delay for dancers, but not operators, infringed upon the exercise of First Amendment rights. *Kev, Inc. v. Kitsap*

no distinction between operators' and dancers' licenses in holding that suspension or revocation of either type of license constitutes a prior restraint. However, as noted above, the court did not extend the full protection of CONST. art. I, § 5.

With respect to claims of overbreadth, the Supreme Court has interpreted the First Amendment by stating, "particularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *New York v. Ferber*, 458 U.S. 747, 770, 102 S. Ct. 3348, 73 L. Ed. 1113 (1982) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 615, 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1973)).

A comparison of the language in the First Amendment and CONST. art. I, § 5 does not dictate adoption of a more protective state doctrine for determining overbreadth. *See State v. Talley*, 122 Wn.2d 192, 209, 858 P.2d 217 (1993) (stating that Washington courts apply a federal analysis to claims of overbroad restrictions on speech).

County, 793 F.2d 1053, 1060 n.6 (9th Cir. 1986) (finding that the delay in issuing an operator's license gave the police department time to allocate resources to ensure compliance with the city ordinance). *See also TK's Video, Inc. v. Denton County*, 24 F.3d 705, 708-09 (5th Cir. 1994) (upholding a 60-day period for processing operator's license applications, during which county officials performed background checks, made identification cards, and policed zoning arrangements); *World Wide Video, Inc. v. City of Tukwila*, 117 Wn.2d 382, 392-94, 816 P.2d 18 (1991) (holding under the federal constitution that time-consuming and necessary investigations justified a 30-day license approval period for operators of peep show booths), *cert. denied*, 503 U.S. 986 (1992).

See also O'Day, 109 Wn.2d at 804 (applying the federal test for overbreadth but finding more protection if overbreadth rises to the level of a prior restraint).

It is clear that the differences in the texts of art. I, § 5 and the First Amendment may justify a different interpretation under the state constitution. It is also clear that greater protection under the state constitution is not warranted in every context. Respondents have failed to explain how the difference in texts justifies greater state constitutional protection in the context of sexually explicit nude and semi-nude dancing.

The third factor to consider is constitutional history. Although the State Constitutional Convention adopted the most protective of three proposed free speech provisions, this choice sheds no light on whether the drafters intended that art. I, § 5 give greater protection than the federal constitution in this context. *See Russell, Reece, Sugarman,* and *Ramm,* (indicating that state constitutional provisions may offer greater protection only in certain contexts).

The fourth factor in a *Gunwall* analysis is preexisting state law. State cases and statutes from the time of the constitution's ratification, rather than recent case law, are more persuasive in determining whether the state constitution gives enhanced protection in a particular area. *See Reece,* 110 Wn.2d at 779 (noting, as part of its *Gunwall* analysis, that Washington criminalized obscenity both immediately prior to and after ratification of the state constitution); *Gunwall,* 106 Wn.2d at 66 (looking to the prestatehood Code of 1881 for evidence that the state

constitution gives enhanced protection for telephonic communications).

The city cites a case published in 1893 in which this court interpreted a statute to proscribe only businesses providing a public show "which openly outrages decency and tends to corrupt the public morals." *State v. Brown*, 7 Wash. 10, 13, 34 P. 132 (1893). The statute in question provided for the abatement as nuisances of "all . . . structures used as a place of resort, where women are employed to draw custom, dance, or for purposes of prostitution. . . . " *Id.* at 11 (citing HILL'S GEN. STAT., Vol. I, § 2894 (1891)).

Respondents offer no evidence that the constitution's drafters intended, in the context of sexually explicit nude and semi-nude dancing, to impose a stricter standard for regulations challenged as overbroad or as unduly restricting the time, place, or manner of expression. Neither do Respondents cite recent case law to support this proposition.

In regard to prior restraints, Respondents cite our recent decision in *JJR, Inc.*, to argue that the state constitution provides more protection than its federal counterpart against prepublication sanctions. In *JJR, Inc.*, we invalidated as a prior restraint a provision allowing revocation and suspension of operators' licenses without sufficient procedural safeguards. *JJR, Inc.*, 126 Wn.2d at 9. The provision suppressed future expression because establishments with revoked or suspended licenses were prohibited from showcasing nude dancing. *Id.* at 8. We declined to apply the general rule categorically invalidating all prior restraints, stating that an adult entertainment

licensing scheme providing for revocation or suspension of licenses was valid provided that procedural safeguards were available.[3] *Id.*

Thus, pre-existing state law justifies a greater degree of protection from regulations which impose prior restraint on the expressive conduct of sexually explicit dance, but does not support application of the more rigorous time, place, and manner analysis developed in the context of pure speech in a traditional public forum.

The fifth *Gunwall* factor to consider is the structural difference between the federal and state constitutions. The federal constitution is a grant of enumerated powers, while the state constitution acts as a limitation on the otherwise plenary powers of state government. *Reece*, 110 Wn.2d at 780 (citing *Gunwall*, 106 Wn.2d at 62). This distinction simply reinforces this court's responsibility to engage in independent state analysis and afford broader protection when necessary. *Id.*

The sixth factor is whether this case raises a matter of particular state or local concern. With regard to adult entertainment, Respondents state only that "activities of

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[3] In *O'Day*, we held that the language of art. I, § 5 categorically prohibits prior restraints on constitutionally protected speech. *O'Day v. King County*, 109 Wn.2d 796, 804, 749 P.2d 142 (1988). However, the provision allows prior restraints on obscene speech, which receives no constitutional protection. *State v. Coe*, 101 Wn.2d 364, 375, 679 P.2d 353 (1984) (*citing City of Seattle v. Bittner*, 81 Wn.2d 747, 757, 505 P.2d 126 (1973) (obscenity) and *Fine Arts Guild, Inc. v. City of Seattle*, 74 Wn.2d 503, 445 P.2d 602 (1968) (obscenity)).

this nature have been traditionally regulated by municipalities." Br. of Resp't at 28. This factor favors an independent state analysis; however, we do not agree that greater protection follows, because, as Appellant points out, both state and local law regulated or prohibited dancing early in this state's history. Appellant cites a Washington statute enacted in 1889 granting cities the authority to "prohibit or suppress, or license or regulate all dance houses. . . . " BAL. CODE § 855(4) (1897). Appellant also points to *Pearson v. City of Seattle*, 14 Wash. 438, 439, 44 P. 884 (1896), concerning a City of Seattle ordinance prohibiting dances in any saloon or in any place in connection with liquor sales. We conclude that while traditional regulation by municipalities supports independent analysis under the state constitution, it does not support enhanced protection for self-expression through sexually explicit dancing.

Respondents fail to show that the sexually explicit dance at issue in this case warrants application of the more protective time, place, and manner analysis developed under art. I, § 5 of the state constitution. Nor is greater protection indicated with regard to the claims of overbreadth not rising to the level of prior restraint. Therefore, we will evaluate Respondents' claims of overbreadth and challenges to time, place, or manner regulations by applying federal constitutional law. However, the text and history of CONST. art. I, § 5 dictate enhanced protection under the state constitution in the context of adult entertainment regulations that impose prior restraints.

A.

Licensing Scheme

Respondents argue that the 14-day processing period for managers' licenses established in BCC § 5.08.040(C)(3), with no issuance of temporary licenses during this period, is an unconstitutional prior restraint. Respondents point out that section (C)(4) provides for the issuance of temporary licenses to dancers, but not to managers.

We find that a 14-day delay in issuing a manager's license is similar to the revocation and suspension of an operator's license in *JJR, Inc.* The delay in issuing a manager's license suppresses future expression because the City permits nude dancing only if licensed managers are present. Although in *JJR, Inc.*, we stated that a provision revoking or suspending licenses was constitutional if it provided for a stay pending judicial review, no such procedural safeguards would cure the constitutional infirmities of BCC § 5.08.040(C)(3). *JJR, Inc.*, 126 Wn.2d at 10-11. Therefore, we hold that the City's failure to provide managers with temporary licenses during the 14-day delay constitutes a prior restraint in violation of the Washington Constitution.

Respondents also claim that BCC § 5.08.040(C)(1), which requires the disclosure of information such as recent criminal convictions and employment history,[4] violates privacy rights guaranteed by article I, section 7 of

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[4] BCC § 5.08.040(C)(1) requires entertainers and managers to provide the applicant's name, home address, home telephone number, date and place of birth, fingerprints taken by the Bellevue Police Department, social security number, and any

the state constitution. This court previously analyzed art. I, § 7 in *Gunwall*, covering factors 1, 2, 3, and 5. *Gunwall*, 106 Wn.2d at 65-68. We need only analyze factors 4 and 6, which are generally unique to the context presented by the individual case. *State v. Johnson*, 128 Wn.2d 431, 445, 909 P.2d 293 (1996).

Under the fourth *Gunwall* factor we examine preexisting state law. Although Respondents point to the "heightened protection" of art. I, § 7, Br. of Resp't Deja Vu at 45, they cite only cases of warrantless search and seizure in which this court held that the state constitution offers more protection than the Fourth Amendment. *See, e.g., State v. Stroud*, 106 Wn.2d 144, 148, 720 P.2d 436 (1986) (warrantless search of automobile); *State v. Boland*, 115 Wn.2d 571, 578, 800 P.2d 1112 (1990) (warrantless search of garbage). Our decision in *O'Hartigan v. Department of Personnel*, 118 Wn.2d 111, 117, 821 P.2d 44 (1991) is more persuasive in this case. There the court recognized two types of interests protected by the right to privacy: the right to autonomous decisionmaking and the right to nondisclosure of intimate personal information, or confidentiality. In questions involving the latter right, the state constitution offers no greater protection than the federal

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stage names or nicknames used in entertaining; the name and address of each business at which the applicant intends to work; documentation that the applicant is at least eighteen years old; a complete statement of all convictions within the last five years preceding the date of the application, except for parking violations and minor traffic infractions; a description of the applicant's principal activities or services to be rendered; and a two by two inch photograph of the applicant, taken within six months of the date of application showing only the full face.

constitution, which requires only application of a rational basis test. *Id.* at 117-18; *In re A, B, C, D, E,* 121 Wn.2d 80, 97, 847 P.2d 455 (1993).

The sixth factor considers whether the regulated matter is of particular state or local concern. Respondents merely state that "the matter before the Court involves matters that are uniquely of local concern." Br. of Resp't at 41. Without more we are unpersuaded that the state constitution offers greater protection in this context.

Because the interest in confidentiality or nondisclosure of personal information is not "a fundamental right requiring utmost protection" we conclude that a rational basis test applies to Respondents' privacy claim in this case. *O'Hartigan,* 118 Wn.2d at 117. The rational basis test requires that a regulation be carefully tailored to meet a legitimate governmental goal. *Id.; BSA, Inc. v. King County,* 804 F.2d 1104, 1111 (9th Cir. 1986). Here the trial court found that the licensing requirements advance several legitimate goals. They protect minors, assure the correct identification of persons working in adult cabarets, enable the City to deploy law enforcement resources effectively, and detect and discourage the involvement of organized crime in the adult entertainment industry. We find that the disclosure provisions are valid under the rational basis test because they require only the type of information that would advance these goals.

B.

Distance Requirements

Two distance requirements are at issue here: the four-foot requirement between dancers and patrons during

individual performances and the eight-foot requirement between stage dancers and patrons. Respondents challenge the four-foot rule for individual dances as a prior restraint on expression.[5]

Before we will apply the highly protective rules against prior restraints, first we must determine whether the challenged rule affects expression. Respondents presented evidence that entertainers use close proximity during table and couch dances to convey a message of erotic intimacy. The trial court acknowledged this evidence in finding of fact 27.

Courts previously have held that the communication of a nude dancer receives constitutional protection, although nudity itself is conduct subject to the police powers of the state. *See, e.g., Kitsap County v. Kev, Inc.*, 106 Wn.2d 135, 140, 720 P.2d 818 (1986); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 565, 111 S. Ct. 2456, 115 L. Ed. 2d 504 (1991) (plurality opinion); *Id.* at 581 (Souter, J., concurring); *Id.* at 587 (White, Marshall, Blackmun, and Stevens, JJ., dissenting); *O'Day*, 109 Wn.2d at 802. Based on Respondents' evidence and the trial court's findings of fact, we conclude that the four-foot rule does regulate expression.

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[5] BCC § 5.08.070(A)(6) provides:

> No employee or entertainer mingling with members of the public shall conduct any dance, performance or exhibition in or about the nonstage area of the adult cabaret unless that dance, performance or exhibition is performed at a distance of no less than four feet from any member of the public.

Respondents also must show that the challenged regulation rises to the level of a prior restraint, and thus is subject to the more protective rules against prior restraints than those against regulations affecting only the time, place, or manner of expression. This court has defined prior restraints as "official restrictions imposed upon speech or other forms of expression in advance of actual publication." *City of Seattle v. Bittner*, 81 Wn.2d 747, 756, 505 P.2d 126 (1973) (quoting Thomas I. Emerson, *The Doctrine of Prior Restraint*, 20 LAW & CONTEMP. PROBS. 648 (1955)). We have applied prior restraint analysis in cases involving licensing schemes and court orders that effectively banned speech. For example, in *Bittner* we held that government officials imposed prior restraints when they required licensing for operation of adult entertainment establishments, but refused to issue licenses to applicants who previously had engaged in illicit activities. *Bittner*, 81 Wn.2d at 755-56; *see also JJR, Inc.*, 126 Wn.2d at 6 (licensing scheme); *Coe*, 101 Wn.2d at 372, (court order); *State ex rel. Superior Court v. Sperry*, 79 Wn.2d 69, 75-78, 483 P.2d 608 (court order), *cert. denied*, 404 U.S. 939.

However, not every regulation of speech or expression rises to the level of a prior restraint. This court has analyzed regulations which do not ban expression but impose temporal or geographic limitations as time, place, or manner restrictions. *See Collier*, 121 Wn.2d at 747 (analyzing an ordinance which did not completely ban political signs as a time, place, or manner restriction); *Coe*, 101 Wn.2d at 373 (stating that a regulation may not rise to the level of a prior restraint if it merely restricts the time, place, or manner of expression).

Respondent Ino Ino, Inc., argues that under CONST. art. I, § 5 the distance restriction is unconstitutional as a prior restraint because the restriction denies entertainers a "full opportunity to use space and proximity as an element of their dance" and "the individual has no opportunity to demonstrate in a judicial forum that there is no basis for imposing the restraint." Br. of Resp't at 35-36. Ino Ino, Inc., claims that a party subjected to this restriction should have the same procedural rights as one who faces abatement. *Id.* This requirement would be "consistent with the text of art. I, § 5 that free speech rights should not be abridged, unless they have been previously abused." *Id.* Respondents thus base their prior restraint claim on the premise that each adult cabaret should have an opportunity to show that it prohibits public sexual contact before the City can require compliance.

A regulation is not a prior restraint, however, simply because a party can present evidence that it does not cause the problems targeted by the regulation. *Ward v. Rock Against Racism*, 491 U.S. 781, 801, 109 S. Ct. 2746, 105 L. Ed. 2d 661 (stating that the validity of a regulation depends on its relation to the overall problem a city seeks to correct), *reh'g denied*, 492 U.S. 937 (1989). Moreover, the four-foot distance regulation at issue here does not ban table dancing. Rather, it imposes a place or manner restriction on the performance of the dance. Thus, it is more properly analyzed as a time, place, or manner restriction. BCC § 5.08.130 also provides the individual

cabaret an opportunity to establish in a judicial proceeding that it complies with the distance requirements before the city can impose sanctions.[6]

Respondents have failed to show that the four-foot rule for individual dances rises to the level of a prior restraint. Nevertheless, the rule does regulate the time, place, or manner of expression. Under *O'Brien*, 391 U.S. at 377, the government's regulation of the time, place, or manner of expressive conduct is sufficiently justified if (1) the regulation is within the constitutional power of the government; (2) the regulation furthers an important or substantial governmental interest; (3) the governmental interest is unrelated to the suppression of free expression; and (4) the incidental restriction on alleged First Amendment freedoms is no greater than essential to the furtherance of that interest. In this case, the *O'Brien* test is the applicable standard.[7] *See Barnes*, 501 U.S. at 566.

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[6] BCC § 5.08.130 provides:

> A. Public nuisance. Any adult cabaret operated . . . in violation of . . . any law of the City of Bellevue . . . shall be . . . declared to be . . . a public nuisance. The city attorney may . . . commence an action to enjoin, remove or abate such nuisance in the manner provided by law and shall take such other steps and apply to such court or courts as may have jurisdiction to grant such relief as will abate or remove such public nuisance[.]

[7] Whether the *O'Brien* test for expressive conduct offers the same degree of protection for the right to free speech as the traditional time, place and manner test is unclear. According to a case from the Ninth Circuit Court of Appeals, the *O'Brien* test for expressive conduct and the time, place or manner test for pure speech protect these forms of expression to the same

The four-foot rule meets the requirements of the *O'Brien* test. The provision is within the constitutional power delegated by the State to the City of Bellevue to protect the health and welfare of its citizens. *See State v. Brayman*, 110 Wn.2d 183, 192-93, 751 P.2d 294 (1988) (stating that art. I, § 1 of the Washington Constitution empowers the Legislature to enact laws promoting the health, peace, safety, and general welfare of the people).

The provision furthers an important or substantial governmental interest because it facilitates the detection of public sexual contact and discourages contact from occurring in the first place. Courts have recognized the government's substantial interest in curbing these secondary effects of adult entertainment. *See, e.g., City of*

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degree. *See Kev, Inc. v. Kitsap County*, 793 F.2d 1053, 1058 (9th Cir. 1986) (interpreting *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 96 S. Ct. 2440, 49 L. Ed. 2d 310, *reh'g denied*, 429 U.S. 873 (1976)). Furthermore, in *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 298, 104 S. Ct. 3065, 82 L. Ed. 2d 221 (1984), the Supreme Court stated that there is "little, if any" difference between the time, place, or manner test and the four-factor *O'Brien* test for expressive conduct. Contrary to those cases, however, a relatively recent Supreme Court case suggests that the federal courts do distinguish between the two forms of expression. Four Supreme Court Justices continue to interpret *O'Brien* as providing less protection to expressive conduct than to pure speech. *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 566, 111 S. Ct. 2456, 115 L. Ed. 2d 504 (1991) (plurality opinion of Rehnquist, C.J., Kennedy and O'Connor, JJ.) (interpret *O'Brien* as rejecting the contention that symbolic speech is entitled to full First Amendment protection.); *Id.* at 582 (Souter J., concurring) (agreeing with the plurality that the appropriate analysis was the *O'Brien* test "for judging the limits of . . . state action burdening *expressive acts as distinct from pure speech*. . . . ") (Emphasis added).

Renton v. Playtime Theatres, Inc., 475 U.S. 41, 48, 106 S. Ct. 925, 89 L. Ed. 2d 29 (holding that the City of Renton had a substantial interest in combating the undesirable secondary effects of adult theaters, such as crime and a drop in property values), *reh'g denied*, 475 U.S. 1132 (1986); *Barnes*, 501 U.S. at 582 (Souter, J., concurring) (stating that the governmental interest in combating secondary effects of adult entertainment establishments is substantial); *BSA, Inc. v. King County*, 804 F.2d 1104, 1111 (9th Cir. 1986) (recognizing sexual contact as a secondary effect of adult entertainment). Furthermore, Bellevue may rely on experiences of other jurisdictions to show that its ordinances further the substantial interest in curbing secondary effects. *See Playtime Theatres, Inc.*, 475 U.S. at 50-51.

Respondents imply that the actual purpose of the ordinances is to eliminate adult entertainment from the City of Bellevue. However, a court should not strike down an otherwise constitutional statute on the assumption that the legislative body had a wrongful purpose. *O'Brien*, 391 U.S.at 383; *McCray v. United States*, 195 U.S. 27, 56, 24 S. Ct. 769, 49 L.Ed. 78 (1904). Therefore, the possibility of a wrongful purpose on the part of the City Council is insufficient reason to strike down a provision with the stated purpose of preventing criminal behavior.

Respondents also argue that applying the four-foot rule to their adult cabarets does not serve the stated purpose of the rule because the City has not proven that these particular cabarets produce the targeted secondary effects. The validity of a regulation, however, depends on its relation to the overall problem a city seeks to correct. *Ward v. Rock Against Racism*, 491 U.S. 781, 801, 109 S. Ct. 2746, 105 L. Ed. 2d 661, *reh'g denied*, 492 U.S. 937 (1989). In

Ward, a party challenged a requirement that the city's sound technician control amplification equipment for all concerts. The court considered all bands affected by the regulation, rather than just the plaintiff, to judge whether the requirement related to the overall problem of inexperienced technicians and insufficient sound volume. *Id.* In this case, the City relied on evidence that adult cabarets generally produce certain harmful secondary effects. In order to prevent these secondary effects, the City may regulate all adult cabarets and require Respondents' compliance despite their claims that they do not produce the secondary effects targeted by the regulation.

As required by the third *O'Brien* factor, Bellevue's interest in curbing the secondary effects of adult entertainment is unrelated to the suppression of free expression. Although the challenged ordinances apply only to adult theaters, as opposed to other kinds of theaters, the Supreme Court has held that the interest in controlling secondary effects justifies different treatment for adult entertainment establishments. *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 71 n.34, 96 S. Ct. 2440, 49 L. Ed. 2d 310 (plurality opinion) (upholding an ordinance that affected only adult theaters because it had the purpose of preventing urban areas from becoming the focus of crime), *reh'g denied*, 429 U.S. 873 (1976); *Barnes*, 501 U.S. at 586 (Souter, J., concurring); *see also Collier v. Tacoma*, 121 Wn.2d 737, 752, 854 P.2d 1046 (1993) (indicating a willingness to distinguish adult theaters from other kinds of theaters based on the secondary effects of adult entertainment).

The fourth *O'Brien* factor is also satisfied because the distance restriction is no greater than essential to further

the interest in preventing public sexual contact. The four-foot rule requires just an arm's length distance between a dancer and patron. Furthermore, it allows dancers to engage in all types of movement, with the exception of pure sexual conduct, in order to convey eroticism.

However, Respondents argue that the four-foot rule is so restrictive as to deny dancers a reasonable means of earning a living and cause the imminent failure of all adult cabarets in Bellevue. If such a failure was inevitable, then the distance requirement would be unconstitutional. In *Gomillion v. Lightfoot*, 364 U.S. 339, 340-41, 81 S. Ct. 125, 5 L. Ed. 2d 110 (1960), the Supreme Court sustained a complaint which, if true, established that newly drawn municipal boundaries would have the "inevitable effect" of depriving a racial group of their constitutional right to vote. The stated purpose of the legislation in *Gomillion* was irrelevant because inevitably its provisions violated a constitutional right. *Id.; see also O'Brien*, 391 U.S. at 385 (finding that the destruction of Selective Service certificates was not necessarily expressive, and thus a statute prohibiting this activity did not inevitably violate a constitutional right). In this case, Respondents presented evidence showing only that financial failure was possible, and thus failed to show an "inevitable effect" such as that in *Gomillion*.

Respondents also contend that the four-foot rule is too restrictive because "the dancers' message would be significantly less well received by the intended audience from four feet away." Reply Br. of Resp't at 20. They argue that customer dissatisfaction will result in lower revenues for dancers, who then will be "unwilling" to pay rent to the cabarets. Even if these predictions prove

true, such a result would not necessarily mean that the four-foot rule denies dancers and club owners a reasonable means of earning a living. Decreased opportunity for illegal sexual contact could be one cause of customer dissatisfaction. The instant case also is easily distinguishable from a case cited by Respondents, *United States v. National Treasury Employees Union*, 513 U.S. 454, 115 S. Ct. 1003, 130 L. Ed. 2d 964 (1995), in which the Supreme Court invalidated a regulation prohibiting federal workers from receiving compensation for speaking engagements. By contrast, Bellevue places no restrictions on the amount of payment dancers may receive and, thus, does not effectively foreclose a reasonable means of earning a living.

Our decision upholding the four-foot restriction is in accord with other courts which have upheld more restrictive separation requirements. *See, e.g., Kev, Inc. v. Kitsap County*, 793 F.2d 1053, 1061 (9th Cir. 1986) (upholding a regulation requiring that all dancing in erotic dance studios take place at least ten feet from patrons); *DLS, Inc., v. City of Chattanooga*, 894 F. Supp. 1140, 1145-46 (E.D. Tenn. 1995) (upholding a regulation requiring at least six feet between dancers and patrons in order to prevent sexual contact during table and couch dances).

Although Respondents presented evidence that the four-foot rule regulates expression, they presented no evidence that the eight-foot rule for stage dancing affects expression. As a result, the trial court found that proximity is not an instrument of communication for stage dancing, in which the dancers direct their erotic message

to the entire audience in the adult cabaret.[8] The judge therefore applied rational basis scrutiny and upheld the regulation.

Because the eight-foot requirement limits only proximity and does not restrict the expressive aspect of stage dancing, the rational basis test is applicable. *See BSA, Inc. v. King County,* 804 F.2d 1104, 1111 (9th Cir. 1986) (upholding a six-foot stage requirement because the plaintiffs presented no evidence that the distance between entertainer and patron was an integral part of the expression). In *O'Day,* this court found that a similar distance requirement did not affect expression because it merely specified the place from which dancers may convey an erotic message. We not only upheld the distance requirement, but also refused to do a time, place or manner analysis because the restriction affected only conduct. *O'Day,* 109 Wn.2d at 810. We similarly find in this case that the eight-foot requirement for stage dancing regulates only conduct, and therefore examine this rule under the rational basis test.

The City performed an experiment demonstrating that a very tall customer could reach a nude stage dancer with only a separation of six feet. As the trial court

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[8] BCC § 5.08.070(A)(1) provides:

> No employee or entertainer shall be unclothed or in such less than opaque and complete attire, costume or clothing so as to expose to view any portion of the female breast below the top of the areola or any portion of the pubic region, anus, buttocks, vulva or genitals, except upon a stage at least eighteen inches above the immediate floor level and removed at least eight feet from the nearest member of the public.

concluded, the governmental interest in preventing illegal contact is a rational basis for extending the minimum distance to eight feet.

C.

Lighting Requirement[9]

Respondents argue that the 30 lux requirement regulates the time, place, or manner of expression by virtually eliminating the use of lighting to enhance the dramatic impact of stage dancing. They argue that the requirement restricts expression on the basis of content because it applies only to performances involving nudity or a message of sexual arousal. They also argue that the requirement permits unbridled discretion by the licensing officials because there is no standardized method of measuring compliance.

The trial court found, however, that increasing the light in the nonstage areas allows patrons to see individual dances more clearly. Although the lighting requirement applies only to adult cabarets, it is well established that a city may treat adult cabarets differently from other

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[9] The minimum lighting standard, BCC § 5.08.070(D)(2), reads:

> Lighting. Sufficient lighting shall be provided and equally distributed throughout the public areas of the premises so that all objects are plainly visible at all times. A minimum lighting level of 30 lux horizontal measured at 30 inches from the floor on 10-foot centers is hereby established for all areas of the adult cabaret where members of the public are admitted.

types of clubs if the regulation targets secondary effects. Furthermore, discretion is limited because the trial court interpreted BCC § 5.08.070(D)(2) as not requiring 30 lux at all points in an adult cabaret. The regulation provides for measurement with a light meter 30 inches from the floor and on 10-foot centers.

We find that the *O'Brien* test is applicable to the lighting regulation because it affects the manner of expression in adult cabarets. We also find that the regulation withstands scrutiny under that test. The regulation is within the constitutional power of the government to protect the health and welfare of its citizens against criminal activity. The regulation furthers the important or substantial governmental interest in providing a level of lighting that would allow officers to detect violations of the ordinance or of criminal statutes. This interest in preventing criminal behavior is unrelated to the suppression of free expression. The incidental restriction on free expression is no greater than essential to further the governmental interest because the lighting requirement is narrowly tailored to the need for visibility. *See World Wide Video, Inc.*, 117 Wn.2d at 392 (upholding a requirement of evenly distributed lighting throughout peep show booths) (citing *Acorn Invs., Inc. v. City of Seattle*, 887 F.2d 219, 223 (9th Cir. 1989)).

D.

Closing Hour Provision

Although the closing hour provision[10] limits expression during certain hours, we find it is constitutionally valid under *O'Brien*. The City acted within its constitutional power to protect the health and welfare of its citizens by requiring adult cabarets to close from 2 a.m. to 10 a.m. The requirement advances the substantial governmental interest of preventing the flow of patrons from bars, which close at 2 a.m., to adult cabarets. This interest is unrelated to the erotic message conveyed by dancers and the restrictions on First Amendment freedoms is no greater than essential to the furtherance of the city's interest since adult cabarets may operate 16 hours a day, 7 days a week. *See Mitchell v. Commission on Adult Entertainment Establishments*, 10 F.3d 123, 139 (3d Cir. 1993) (upholding a statute establishing closing hours for adult entertainment establishments).

E.

Overbreadth of Outdoor Prohibition and Other Challenged Provisions

Respondents raise three claims of overbreadth, and Appellant challenges the trial court's conclusion that one of the provisions is overbroad. First, Respondents claim that the definition of "adult entertainment" contained in

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[10] BCC § 5.08.070(E) provides that "[i]t is unlawful for any adult cabaret to be operated or otherwise open to the public between the hours of two a.m. and ten a.m."

BCC § 5.08.010(B) is overbroad because it covers businesses and activities that the City has not shown to produce harmful secondary effects. Br. of Resp'ts at 45, 47. Second, Respondents claim that BCC § 5.08.070(A)(6) is overbroad because the four-foot rule applies to any performance regardless of whether it is the type that investigations have shown to produce sexual contact. Third, Respondents claim that the prohibition against certain types of sexual conduct in BCC § 5.08.070(A)(5) is overbroad because it covers nonobscene acts. The City appeals the trial court's conclusion that BCC § 5.08.070(B)(2), the "outdoor prohibition," is unconstitutionally overbroad. Br. of Appellant at 8.

A statute is overbroad if it sweeps constitutionally-protected expression within its prohibitions. *New York v. Ferber*, 458 U.S. 747, 770, 102 S. Ct. 3348, 73 L. Ed. 2d 1113 (1982). However, an ordinance regulating expressive conduct as opposed to pure speech will be overturned only if the overbreadth is "both real and substantial in relation to the ordinance's plainly legitimate sweep." *City of Seattle v. Webster*, 115 Wn.2d 635, 641, 802 P.2d 1333, 7 A.L.R.5th 1100 (1990) (applying the First Amendment overbreadth doctrine) (quoting *City of Seattle v. Eze*, 111 Wn.2d 22, 31, 759 P.2d 366, 78 A.L.R.4th 1115 (1988)), *cert. denied*, 500 U.S. 908 (1991); *Broadrick v. Oklahoma*, 413 U.S. 601, 615, 93 S. Ct. 2908, 37 L. Ed. 2d 830) (1973)).

Respondents first challenge the definition of "adult entertainment" in BCC § 5.08.010(B).[11] Respondents argue

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[11] BCC § 5.08.010(B)(1) defines "Adult Entertainment" as "[a]ny exhibition, performance or dance of any type conducted

that Bellevue's definition of "adult entertainment" includes businesses that are not "traditional striptease clubs" and therefore have not been shown to produce the secondary effects targeted by Bellevue's ordinances. Br. of Resp't at 45-46. Respondents contemplate businesses that might feature a "Las Vegas style review with some nudity." Reply Br. of Resp't at 17. They also contemplate businesses that might feature a single performance in which a single entertainer exposes certain anatomical areas or depicts sexual activities. Br. of Resp't at 47. Moreover, the definition of "adult entertainment" makes the ordinance applicable to such businesses regardless of whether they regularly feature these types of performances. Respondents rely on *World Wide Video, Inc.*, 117 Wn.2d at 389, in which this court rejected the city's reliance on studies of adult movie theaters and peep shows to justify restrictions affecting businesses with only "take home" merchandise. Br. of Resp't at 50-51.

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in a premises where such exhibition, performance or dance involves a person who is unclothed or in such . . . attire . . . as to expose any portion of the female breast . . . anus, buttocks, vulva or genitals . . . "

BCC § 5.08.010(B)(2) defines "Adult Entertainment" as "[a]ny exhibition, performance or dance of any type conducted in a premises where such exhibition, performance or dance is distinguished or characterized by a predominant emphasis on the depiction . . . of the following sexual activities . . . "

BCC § 5.08.010(B)(3) defines "Adult Entertainment" as "[a]ny exhibition, performance or dance which is intended to sexually stimulate any member of the public and which is conducted on a regular basis or as a substantial part of the premises activity."

Here the businesses which Respondents contemplate as falling impermissibly within the ordinance's reach would feature live dancing that includes nudity – the same type of activity studied by Bellevue. Moreover, the theory that a substantial number of businesses feature nude dancing only occasionally or only through a Las Vegas style review is unrealistic considering Respondents' insistence that their dancers rely on table and couch dances for revenues. Thus, any overbreadth is not real or substantial in relation to the ordinance's plainly legitimate application to adult cabarets of the type studied by Bellevue and surrounding jurisdictions.

Next, Respondents claim that the four-foot rule in BCC § 5.08.070(A)(6) is overbroad because it requires that all nonstage dancing be performed no less than four feet from "any member of the public." Br. of Resp't at 51. Where possible and appropriate, a court should construe a statute to uphold its constitutionality. *City of Tacoma v. Luvene*, 118 Wn.2d 826, 840, 827 P.2d 1374 (1992). A simple limiting construction can cure the possible overbreadth infirmities of a regulation so as to preserve its constitutionality and serve a city's intention to proscribe only certain conduct. *Soundgarden v. Eikenberry*, 123 Wn.2d 750, 763-64, 871 P.2d 1050 (1994); *State v. Halstien*, 122 Wn.2d 109, 122-23, 857 P.2d 270 (1993)). This court's construction of a statute or ordinance becomes as much a part of the legislation as if it were originally written into it. *State v. Regan*, 97 Wn.2d 47, 51-52, 640 P.2d 725 (1982)). The provision requiring a distance of four-feet for individual dances is not overbroad because the trial court appropriately interpreted the provision as establishing this minimum distance between a dancer and "his or her

customer." CP at 185 (DeJa Vu conclusion of law 8); *see Soundgarden*, 123 Wn.2d at 757.

Finally, Respondents challenge BCC § 5.08.070(A)(5),[12] which they argue prohibits nonobscene expression because the dramatic works exception, BCC § 5.08.070(F),[13] is too narrow. The latter provision, however, excepts all conduct which is nonobscene from the prohibition in section 5.08.070(A)(5), and excludes from the exception only the obscene conduct described in RCW 7.48A.010(2)(b).[14] Thus, contrary to Respondents' claim,

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[12] BCC § 5.08.070(A)(5) provides: "No employee or entertainer shall perform actual or simulated acts of sexual conduct as defined in this chapter, or any act which constitutes a violation of chapter 7.48A, the Washington Moral Nuisances Statute, or Chapter 10A.88 of the BCC."

[13] BCC § 5.08.070(F) provides:

This chapter shall not be construed to prohibit:

1. Plays, operas, musicals, or other dramatic works that are not obscene;
2. Classes, seminars and lectures which are held for serious scientific or educational purposes and which are not obscene; or
3. Exhibitions, performances, expressions or dances that are not obscene.

These exemptions shall not apply to the sexual conduct described in RCW 7.48A. 010(2)(b)(ii) and (iii).

(Emphasis added).

[14] RCW 7.48A.010(2) provides:

"Lewd matter" is synonymous with "obscene matter" and means any matter:

(a) Which the average person, applying contemporary community standards, would find, when considered as a whole, appeals to the prurient interest; and

BCC § 5.08.070(F) is valid because it prohibits only obscene expression.

Turning to Appellant's argument, the City contends that the trial court erred in holding unconstitutional the City's prohibition on any nude performances "or graphic representation thereof" outside of adult cabarets. Br. of Appellant at 8. The purpose of the provision is to assure that minors and other passersby are not subjected to offensive displays. *Id.* The challenged provision, § 5.08.070(B)(2), provides:

> B. *At any adult cabaret,* the following are required:
>
> 2. *Neither the performance nor* any photograph, drawing, sketch or other pictorial or *graphic representation thereof* displaying any portion of the breasts below the top of the areola or any portion of the pubic hair, buttocks, genitals,

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(b) Which explicitly depicts or describes patently offensive representations or descriptions of:

(i) Ultimate sexual acts, normal or perverted, actual or simulated; or

(ii) Masturbation, fellatio, cunnilingus, bestiality, excretory functions, or lewd exhibition of the genitals or genital area; or

(iii) Violent or destructive sexual acts, including but not limited to human or animal mutilation, dismemberment, rape or torture; and

(c) Which, when considered as whole, and in the context in which it is used, lacks serious literary, artistic, political, or scientific value."

and/or anus *may be visible outside of the adult cabaret.*

(Emphasis added).

Public nudity receives limited constitutional protection. *City of Seattle v. Buchanan*, 90 Wn.2d 584, 603, 584 P.2d 918 (1978) (upholding an ordinance banning public nudity because the ordinance was directed at conduct rather than the expression of ideas). Courts have recognized the governmental interest in protecting children from exposure to indecency, psychological abuse, and obscenity. *See Action for Children's Television v. F.C.C.*, 58 F.3d 654 (D.C. Cir. 1995) (en banc) (upholding restrictions intended to protect children from non-obscene but indecent broadcasts); *Bering*, 106 Wn.2d at 241 (finding that the State had a compelling interest in protecting children from the psychological abuse inflicted by picketers' speech); *Soundgarden*, 123 Wn.2d at 758 (finding that the definition of "erotic material" under RCW 9.68.050 is a constitutionally valid definition of obscenity adjusted for minors). States have an interest in the well-being of their youth, and thus the states' power to regulate communicative materials available to children is somewhat broader than their power to regulate materials available to adults. *Video Software Dealers Ass'n v. Webster*, 968 F.2d 684, 688 (8th Cir. 1992) (citing *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212, 214 n.11, 95 S. Ct. 2268, 45 L. Ed. 2d 125 (1975)).

Although the provision here would be overly broad if construed to ban artistic nude images not covered by the dramatic works exception, the City suggests a reasonable constitutional interpretation. Limiting the prohibition to adult cabaret performances or representations of such

performances eliminates the possibility of application to artistic works such as nonobscene nude paintings. This interpretation also serves the City's clear intention to protect minors by proscribing only the outdoor performance or pictorial images of adult cabaret entertainment.

II

Economic Impact

Respondents next contend that the trial court erred in excluding evidence of the ordinance's economic impact. The Supreme Court has held that " '[t]he inquiry for First Amendment purposes is not concerned with economic impact.' " *Playtime Theatres, Inc.*, 475 U.S. at 54 (quoting the concurrence of Powell, J., in *Young*, 427 U.S. at 78). Rather, courts should look only to the ordinance's effect upon freedom of expression. *Young*, 427 U.S. at 78; *see also Topanga Press, Inc. v. City of Los Angeles*, 989 F.2d 1524, 1528 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 1537 (1994).

This court rejected a claim that a six-foot separation during topless table dances would prevent dancers from earning a living. *Bolser v. Washington State Liquor Control Bd.*, 90 Wn.2d 223, 230-31, 580 P.2d 629 (1978) (reaching this decision, however, in the context of the State's broad authority under the Twenty-first Amendment to protect public health, welfare, and morals). The separation was a reasonable method of protecting the public welfare while permitting dancers to practice their occupation. *Id.* However, an ordinance may not eliminate all businesses in existence at the time of its passage. *Walnut Properties, Inc. v. City of Whittier*, 861 F.2d 1102, 1110 (9th Cir. 1988) (declaring unconstitutional an ordinance that effectively

denied Walnut Properties a reasonable opportunity to open and operate an adult theater within the city and would force the closure of all existing adult businesses), *cert. denied*, 490 U.S. 1006 (1989).

The trial court appropriately evaluated Respondents' economic evidence in order to determine whether the ordinance infringed upon freedom of expression. The trial court considered Respondents' evidence on economic impact, stating, "[t]he four foot distance will affect the revenue the dancer could expect to make." CP at 201 (Ino Ino, Inc. finding of fact 24). The court also explained that Respondents' evidence was insufficient to show unduly burdensome economic impact: "None of the [Respondents] are excluded from a business or occupation or prevented from charging a fee for services." *Id.* at 215 (conclusion of law 36).

Next, Respondents claim that the trial court erred in refusing to reconsider its decision on the basis of additional evidence of economic impact offered after judgment. Newly discovered evidence must be that which the moving party "could not with reasonable diligence have discovered and produced at the trial." CR 59(a)(4). The court issued an oral decision on March 31, 1995. On May 3, 1995, Ino Ino, Inc., filed a Motion to Reconsider and Amend Judgment, supported by a declaration by business manager Steve Fueston. The motion and declaration averred that the City's four-foot restriction had resulted in the "dire economic consequences" predicted in trial testimony. CP at 81; *see also* Report of Proceedings (March 16, 1995) at 159, 168 (a part-owner of Papagayo's and Babes testified that the four-foot rule and 30-lux minimum *might* have a negative impact on his clubs).

Respondents' legal and business decisions caused the extent to which the case was tried without evidence of actual economic impact. They successfully moved to consolidate the preliminary injunction hearing with a trial on the merits. Thus, they chose to go to trial without attempting compliance with the City's new regulations.

In any event, the Fueston declaration fails to make a case for reopening the evidence. Mr. Fueston stated that Ino Ino, Inc., began to comply with the City's regulations after the trial court's oral decision on March 31, 1995. Evidence supporting the motion would have consisted of a decline in revenues from the period of noncompliance in March to the period of compliance in April. However, the Fueston declaration states that Papagayo's actually lost more money in March ($37,077.59) than in April ($35,062.49). Ino Ino, Inc., thus makes no showing that the "new" evidence would have altered the trial court's decision.

IV

Motion to Amend Complaint

Ino Ino, Inc., also argues that the trial court abused its discretion by denying leave to file an amended complaint after the trial court had entered its findings, conclusions, and judgment. The amended complaint deletes taking claims that the trial court dismissed with prejudice. The amended complaint also alleges that the City's "unduly repressive" four-foot distance and lighting requirements violate Respondents' substantive due process rights. Br. of Resp't at 56, 58.

Appellate courts apply an abuse of discretion standard to trial courts' decisions denying leave to amend a complaint after the pleadings have closed. *See* CR 15(a); *Elliott v. Barnes*, 32 Wn. App. 88, 645 P.2d 1136, *review denied*, 97 Wn.2d 1037 (1982). A trial court may consider whether the new claim is futile or untimely. *MacLean v. First Northwest Indus. of America, Inc.*, 96 Wn.2d 338, 345, 635 P.2d 683 (1981); *Doyle v. Planned Parenthood, Inc.*, 31 Wn. App. 126, 131, 639 P.2d 240 (1982) (noting that the motion asserted a meritless claim and was submitted after judgment). A plaintiff who makes a substantive due process claim must plead and prove that the challenged government action is "wholly arbitrary and capricious or irrational, or utterly fails to serve a legitimate purpose." *Robinson v. City of Seattle*, 119 Wn.2d 34, 61, 830 P.2d 318, *cert. denied*, 506 U.S. 1028 (1992).

Ino Ino, Inc.'s new claim is both untimely and futile. Respondent untimely brought its motion after the court had entered a final judgment. Furthermore, evaluation of the free speech claims makes clear that the challenged ordinances are not wholly arbitrary and capricious or irrational. Thus, a substantive due process claim would have been futile. The trial court did not abuse its discretion by denying Ino Ino leave to amend its complaint.

V

Attorneys' Fees

Respondents challenge the trial court's decision to award the City attorneys' fees for dissolving the temporary restraining order. Appellant, however, claims that the trial court erroneously limited the award to the amount of

the bond. Generally, Washington courts refuse to award attorneys' fees incurred during litigation in the absence of a contract, statute, or recognized ground of equity. *Hsu Ying Li v. Tang*, 87 Wn.2d 796, 797-98, 557 P.2d 342 (1976). On equitable grounds, a party may recover attorneys' fees reasonably incurred in dissolving a wrongfully issued injunction or restraining order. *Alderwood Assocs. v. Washington Envtl. Council*, 96 Wn.2d 230, 247, 635 P.2d 108 (1981); *Cecil v. Dominy*, 69 Wn.2d 289, 291-92, 418 P.2d 233 (1966). A temporary restraining order is "wrongful" if it is dissolved at the conclusion of a full hearing. *Id.* at 293-94.

The purpose of the equitable rule permitting recovery for dissolving a preliminary injunction or restraining order is to deter plaintiffs from seeking relief prior to a trial on the merits. *White v. Wilhelm*, 34 Wn. App. 763, 773-74, 665 P.2d 407, *review denied*, 100 Wn.2d 1025 (1983). The award for attorneys' fees may exceed the amount of the bond required by Civil Rule 65(c)[15] because the award is based on equity rather than the bond statute. *Seattle Firefighters No. 27 v. Hollister*, 48 Wn. App. 129, 139, 737 P.2d 1302, *review denied*, 108 Wn.2d 1033 (1987); *Hsu Ying Li*, 87 Wn.2d at 799. The amount of a reasonable attorneys' fee is within the trial court's discretion.

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[15] CR 65(c) provides in part: "no restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained."

In this case, the trial court granted the City's request for attorneys' fees, but limited the award to $5,000 – the amount of the bond that the court required of Respondents.[16] *See* CP at 361 (Ino Ino, Inc.) (awarding the City of Bellevue $3,333.33 in attorneys' fees); CP at 231 (Deja Vu) (awarding the City of Bellevue $1,666.67 in attorneys' fees). The city presented evidence that it incurred $34,000 in attorneys' fees for dissolving the temporary restraining order. Yet the trial court gave no explanation for awarding only $5,000. We therefore remand for a determination of attorneys' fees.

The City also argues that it is entitled to attorneys' fees on appeal. However, the equitable rule allowing attorneys' fees for dissolving a temporary restraining order does not entitle a successful defendant to recover all fees incurred in defending against injunctive relief. *Ritchie v. Markley*, 23 Wn. App. 569, 575, 597 P.2d 449 (1979), overruled on other grounds in *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 823, 828 P.2d 549 (1992). A defendant may recover attorneys' fees up to the date on which a wrongfully issued restraining order is

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[16] Pursuant to CR 65, the trial court premised the temporary restraining order on the posting of a bond for $5,000. Respondents argue that the order never took effect because they did not post the bond amount. Therefore, they argue, none of the City's attorneys' fees were incurred in dissolving the temporary restraining order. However, in *White v. Wilhelm*, 34 Wn. App. 763, 665 P.2d 407, *review denied*, 100 Wn.2d 1025 (1983), the court granted fees incurred in an attempt to dissolve a temporary restraining order despite the plaintiff's failure to post bond. Similarly, in this case Respondents may not benefit from their neglect in posting the bond required by the trial court.

dissolved. *Id.* (citing *Talbot v. Gray*, 11 Wn. App. 807, 812, 525 P.2d 801 (1974), *review denied*, 85 Wn.2d 1001 (1975)); *Kelly v. Schorzman*, 3 Wn. App. 908, 914, 478 P.2d 769 (1970); *Berne v. Maxham*, 82 Wash. 235, 144 P. 23 (1914)).

Accordingly, in prior cases we have allowed recovery for attorneys' fees incurred at the appellate level only when appeal was necessary to dissolve a currently effective temporary restraining order. *See Alderwood Assocs. v. Environmental Council*, 96 Wn.2d 230, 247, 635 P.2d 108 (1981) (allowing fees on appeal because the wrongfully issued temporary restraining order had not been dissolved previously by trial, motion, or hearing); *Seattle Firefighters No. 27*, 48 Wn. App. at 138 (allowing fees on appeal because the defendant incurred the fees in order to dissolve temporary injunctions which were still effective prior to appeal); *Federal Way Family Physicians, Inc. v. Tacoma Stands Up For Life*, 106 Wn.2d 261, 268-69, 721 P.2d 946 (1986) (allowing fees incurred on appeal to dissolve a temporary restraining order that was still effective prior to appeal, conditioned on the trial court's decision to deny a permanent injunction after a hearing on the merits).

In contrast to the cases cited above, the trial court in this case dissolved the temporary restraining order prior to appeal after a hearing on the merits except as to BCC § 5.08.070(B)(2) relating to outdoor displays. Therefore, the purpose of discouraging parties from seeking relief prior to a hearing on the merits is inapplicable on this appeal. The City thus may not recover attorneys' fees incurred on appeal despite their success in defending against permanent injunctive relief at this level with the exception that if fees can be segregated, the city may

recover fees expended in dissolving the injunction relating to outdoor displays.

Respondents also seek attorneys' fees, arguing that because they brought their claims under 42 U.S.C. § 1983 (1994)[17] they are entitled to fees pursuant to 42 U.S.C. § 1988 (1994). In a claim based on § 1983, the court "in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs." 42 U.S.C. § 1988 (1994). A plaintiff "prevails" when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff. *Farrar v. Hobby*, 506 U.S. 103, 111-13, 113 S. Ct. 566, 121 L. Ed. 2d 494 (1992) (holding that even a plaintiff who is awarded only nominal relief is a "prevailing party" under this definition).

In this case, Respondents meet the low threshold for prevailing party status because they succeed on their prior restraint challenge to the 14-day delay in issuing managers' licenses. However, 42 U.S.C. § 1988 provides for an award only if a party's rights under the federal

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[17] 42 U.S.C. Section 1983 (1994) provides in pertinent part:

> Every person who, under color of any . . . ordinance . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

constitution or federal law are violated. *Snohomish County v. Anderson*, 124 Wn.2d 834, 881 P.2d 240 (1994).[18]

CONCLUSION

We affirm the trial court's decision that the requirements on distance, lighting, closing hours, and disclosure of personal information are constitutional. We uphold the trial court's evaluation of Respondents' evidence on economic impact, the court's refusal to admit new evidence after judgment was rendered, and the court's denial of Ino Ino, Inc.'s Motion for Leave to Amend its Complaint.

We reverse the trial court's decision with respect to the fourteen-day processing period for a managers' license. The fourteen-day delay, with no issuance of a temporary license for managers, is an unconstitutional prior restraint. We also reverse the trial court's decision invalidating the outdoor prohibition. This provision is constitutional when interpreted to prohibit only the outdoor performance of adult cabaret entertainment or visual images of such entertainment.

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[18] This case is distinguishable from *JJR, Inc.* where this court awarded attorney fees although we found only a violation of the state constitution. We observed, however, that license revocation or suspension has been recognized by federal courts as a prior restraint. In addition, our conclusion in *JJR Inc.* was consistent with *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 110 S. Ct. 596, 107 L. Ed. 2d 603 (1990). In contrast, it is clear that the federal constitution is not violated by a brief delay in license approval. *World Wide Video, Inc.*, 117 Wn.2d at 392-94; *Kev, Inc.*, 793 F.2d at 1060 n.6.

With respect to attorneys' fees incurred prior to the trial court's dissolution of the temporary restraining order, we uphold the trial court's decision granting an award to the City, but remand for a determination of the amount.

DOLLIVER, SMITH and GUY, JJ., concur.

ALEXANDER, J. (concurring in part, dissenting in part) – I concur with the majority opinion in every respect but one. I disagree with its conclusion that the City of Bellevue is entitled to an award of attorney fees for dissolving what was held to be a wrongfully issued temporary restraining order.

My disagreement with the majority stems from the fact that no effective temporary restraining order was in effect that called for dissolution. The putative order that the City sought to dissolve was entered by the trial court on February 24, 1995. It contained the following provision: "This order shall become effective on the posting by plaintiffs of a bond in the amount of $5,000.00[.]" Clerk's Papers at 56. The record shows that the required bond was never posted. As a consequence, the temporary restraining order never came into being. That being the case, the City should not be awarded fees for its efforts to seek its dissolution.

Even assuming that the temporary restraining order was somehow in effect, notwithstanding the respondents' failure to post the $5,000 bond, the City could have moved to quash it for the respondents' failure to post the required bond. If the City had done so, the trial court

would have had no alternative but to grant the motion.[19] In that event, the fees the City would have been entitled to receive for its efforts to quash the bond would have been far less than what it seeks here. The City should not benefit because it ignored the respondents' failure to fulfill a condition precedent to making the trial court's order effective.

The plain fact is that the City is not entitled to an award of fees for resisting the respondents' efforts to have the Bellevue ordinance declared unconstitutional. Perhaps aware of the obstacles it faced in a direct effort to recover fees for defending the constitutionality of its ordinance, the City ingeniously sought fees in an indirect way for its efforts in dissolving the ineffective temporary restraining order. In my judgment, the City is not entitled to fees under that theory or any other. I, therefore, dissent in part.

TALMADGE, J. (concurring in part/dissenting in part) – I agree with the majority's analysis of all of the issues in the case except attorney fees for the dissolution of the temporary restraining order. The majority is correct in concluding that the fees are not limited to the amount of the bond required by CR 65(c). I agree with the majority that 42 U.S.C. § 1988 does not preempt an award of fees

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[19] CR 65(c) provides:

"(c) Security. Except as otherwise provided by statute, no restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained."

to the City of Bellevue (Bellevue) under state law and that the respondents were not a prevailing party for purposes of the federal statute. But I believe Bellevue is entitled to attorney fees on appeal under the dissolution of a wrongful injunction exception to the American rule on attorney fees beyond the fees it incurred simply to dissolve the injunction as to outdoor displays of adult entertainment. RAP 18.1(a).

I disagree with the majority's narrow interpretation of the dissolution of the wrongful injunction exception to the American rule. In *Cecil v. Dominy*, 69 Wn.2d 289, 291-92, 418 P.2d 233 (1966), we stated a broader formulation of the exception:

> Because the trial on the merits had for its sole purpose a determination of whether the injunction should stand or fall, and was the only procedure then available to the party enjoined to bring about dissolution of the temporary injunction, the case comes within the rule that a reasonable attorney's fee reasonably incurred in procuring the dissolution of an injunction wrongfully issued represents damages suffered from the injunction.

See also Alderwood Assocs. v. Washington Envtl. Council, 96 Wn.2d 230, 635 P.2d 108 (1981). The entire thrust of the respondents' cross-appeal was to restore the original injunction. To the extent the respondents maintain in play the question of whether an injunction should be issued, Bellevue is entitled to its expenses incurred for resisting the wrongful injunction respondents sought throughout this case.

In the cases cited by the majority in its opinion at page 45, attorney fees were awarded at trial and on appeal where a party successfully *reversed* a wrongful injunction on appeal. There is a certain illogic to the proposition that a party is entitled to its attorney fees at trial under the wrongful injunction dissolution exception to the American rule in removing the wrongful injunctive order, yet is denied its fees on appeal defending the trial order that dissolved the wrongful injunction. Our policy on the awarding of fees and costs on appeal should more accurately reflect the realities of litigation.

To the extent a party persists in pursuing injunctive relief, the opposing party who successfully dissolves an injunction or successfully defends against the restoration of a wrongfully issued injunction on appeal should be entitled to its reasonable attorney fees.

DURHAM, C.J., concurs with TALMADGE, J.

SANDERS, J. (dissenting) – The length of the majority opinion as well as my dissent demonstrates something is amiss.

Our constitution mandates, in unequivocal language, "[e]very person may freely speak, write and publish on all subjects, being responsible for the abuse of that right." WASH. CONST. art. I, § 5. Our canon for constitutional construction requires words be given their ordinary meaning. *Westerman v. Cary*, 125 Wn.2d 277, 288, 892 P.2d 1067 (1994). We had better follow our constitutional text than confuse it beyond recognition with additions, deletions, nuances, complexities and rules of wholly judicial invention. But such is the corner into which our prior decisions have painted us.

But no matter the length and complexity of our analysis here today, two simple questions must be answered: (1) is nude dancing "speech," and, if so, (2) does the subject ordinance in any way limit its exercise. I answer: Yes, yes. A third question involving reasonable attorney fees, not so simple but very important, is answered later.

I.

Nude Dancing Is Speech

The majority concludes the form of expression at issue in this case (nude dancing) does not warrant the full protections of Washington Constitution article I, section 5, basing this assertion ostensibly on our decision in *JJR Inc. v. City of Seattle*, 126 Wn.2d 1, 8-9, 891 P.2d 720 (1995). But there we held "[n]ude dancing has expressive value requiring constitutional protection. . . . " *Id.* While we noted in that case that nude dancing performed at clubs "clings to the edge of protected expression," we nevertheless concluded it clings to the protected side of the edge. *Id.* at 9. Under this constitutional clause, an inch is as good as a mile. Either the expression is protected speech or it is not. While there may have been a reasonable dispute as to whether nude dancing is the constitutional equivalent of the Gettysburg Address, prior decisions from this court essentially hold nude dancing speaks louder than words. *See also O'Day v. King County*, 109 Wn.2d 796, 803, 749 P.2d 142 (1988) ("[A]rticle 1, section 5 . . . protects nude expression, but not nude conduct.").

II.

Free Speech Is Impaired

Our constitution does not set gradations of protected speech nor should the court judicially amend it to do so, especially when *all* speech is protected on "all subjects." CONST. art. I, § 5. Gradations based on content reflect little more than individual preferences toward the types of speech the State seeks to regulate.[20] If we do not want the

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[20] As Judge Posner said:

> The true reason I think for wanting to exclude striptease dancing from the protection of the First Amendment is not any of the lawyers' classification games. . . . It is a feeling that the proposition, "the First Amendment forbids the State of Indiana to require striptease dancers to cover their nipples," is ridiculous. It strikes judges as ridiculous in part because most of us are either middle-aged or elderly men, in part because we tend to be snooty about popular culture, in part because as public officials we have a natural tendency to think political expression more important than artistic expression, in part because we are Americans – which means that we have been raised in a culture in which puritanism, philistinism, and promiscuity are complexly and often incongruously interwoven – and in part because like all lawyers we are formalists who believe deep down that the words in statutes and the Constitutions mean what they say, and a striptease is not a speech. But the element of the ridiculous is not all on one side. Censorship of erotica is pretty ridiculous too. What kind of people make a career of checking to see whether the covering of a woman's nipples is fully opaque . . . ?

Miller v. Civil City of South Bend, 904 F.2d 1081, 1099 (7th Cir. 1990) (Posner, J., concurring), *cert. granted by Barnes v. Glen*

constitution to mean what it says, we had better amend it than corrupt its text through strained interpretations.

Although our constitutional provision is broader than its federal counterpart, much written about the First Amendment addresses some of the principles common to both. I will therefore use some federal case law to put our state issue in context.

> Under our Constitution, free speech is not a right that is given only to be so circumscribed that it exists in principle but not in fact. Freedom of expression would not truly exist if the right could be exercised only in an area that a benevolent government has provided as a safe haven for crackpots. The Constitution says that Congress (and the States) may not abridge the right to free speech. This provision means what it says. We properly read it to permit reasonable regulation of speech-connected activities in carefully restricted circumstances. But we do not confine the permissible exercise of First Amendment rights to a telephone booth or the four comers of a pamphlet, or to supervised and ordained discussion in a school classroom.

Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 513, 89 S. Ct. 733, 740, 21 L. Ed. 2d 731 (1969). The right of free expression "ranks among the most important of our constitutional rights [; thus] we must recognize that the precious right of free speech requires protection even when the speech is personally obnoxious." *Russo v.*

Theatre, Inc., 498 U.S. 807, 111 S. Ct. 38, 112 L. Ed. 2d 15 (1990), *and judgment reversed by* 501 U.S. 560, 111 S. Ct. 2456, 115 L. Ed. 2d (1991).

Central Sch. Dist. No. 1, 469 F.2d 623, 633-34 (2d Cir. 1972), *cert. denied*, 411 U.S. 932, 93 S. Ct. 1899, 36 L. Ed. 2d 391 (1973). In the federal context, with its less expansive guarantee of free speech, the Ninth Circuit has recognized that "the degree of protection the first amendment affords speech does not vary with the social value ascribed to that speech by the courts." *Kev, Inc. v. Kitsap County*, 793 F.2d 1053, 1058 (9th Cir. 1986).

Recognizing the dancing at issue here is protected expression, we must ask what, if any, restrictions the government may constitutionally impose. The constitutional text would permit none; however, case law, both state and federal, makes the text all but unrecognizable in practical application.

Under the federal standard, a time, place, and manner restriction may be imposed if it furthers only an *important* or *substantial* governmental interest unrelated to free expression, and the restriction goes no further than to promote that interest only. *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 566, 111 S. Ct. 2456, 115 L. Ed. 2d 504 (1991). Such is the test used here by the trial court (Deja Vu-Bellevue Clerk's Papers (CP) 186-87, conclusions of law 9 and 10) and adopted by the majority (Majority at 17). But all of the restrictive provisions at issue here are, at the least, regulations on the time, place, and manner of nude dancing (assuming they are not prior restraints as well).

The majority, having decided that nude or seminude erotic dancing is little more than a poor relative of other forms of expression, concludes that a more permissive (federal standard) analysis is all that our state law

requires. But I see no basis for this approach under our state constitution or our case law because the state text is completely different from the federal. The federal cases cited by the majority were decided long after the state constitution was adopted and, therefore, obviously played no part whatsoever in the original understanding of what our state provision means. Moreover, prior cases decided by our court are on point and contrary to the federal standard.

Our court has held article I, section 5 of our state constitution permits the State to impose time, place, and manner restrictions "on protected expression . . . but only if [the restrictions] (1) are content neutral, (2) are narrowly tailored to serve a *compelling* state interest, and (3) leave open ample alternative channels of communication." *O'Day v. King County*, 109 Wn.2d at 808-09 (emphasis added); *Bering v. Share*, 106 Wn.2d 212, 234, 721 P.2d 918 (1986) ("[R]estrictions on speech can be imposed consistent with CONST. art. I, § 5 only upon showing a compelling State interest."); *Collier v. City of Tacoma*, 121 Wn.2d 737, 753-54, 854 P.2d 1046 (1993) ("Tacoma must prove that its ordinances, taken together, are narrowly drawn to serve a compelling state interest.").[21]

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[21] Cases cited by the majority to the contrary are easily distinguished: *City of Seattle v. Huff*, 111 Wn.2d 923, 926, 767 P.2d 572 (1989) addressed harassing or threatening speech in a nonpublic forum, but did not concern time, place, and manner restrictions on protected means of expression. *State v. Reece*, 110 Wn.2d 766, 781, 757 P.2d 947 (1988), *cert. denied*, 493 U.S. 812, 110 S. Ct. 59, 107 L. Ed. 2d 26 (1989) addressed obscenity, a nonprotected form of expression. *National Fed'n of Retired Persons v. Insurance Comm'r*, 120 Wn.2d 101, 119, 838 P.2d 680

Bellevue's ordinance fails not just one but all three elements required by *O'Day*, 109 Wn.2d at 808-09. Moreover its divergence from the constitutional standard stated in the original text is manifest.

A. Content Neutrality

Collier, 121 Wn.2d at 752, held time, place and manner restrictions that are viewpoint neutral, but subject matter based, are "particularly problematic." We held that such restrictions are permissible only as long as "they are narrowly tailored to serve a *compelling* state interest and leave open ample alternative channels of communication." *Id.* at 753. We recognized that a censorial justification, i.e., one adopted because of a disagreement with the message that a particular speech conveys, will often not be apparent from the face of the legislation and not be supported by a governmental justification unrelated to the suppression of speech or ideas. *Id.* (citing *Burson v. Freeman*, 504 U.S. 191, 212, 112 S. Ct. 1846, 119 L. Ed. 2d 5 (1992) (Kennedy, J., concurring)). A showing of improper legislative intent, therefore, is usually "practically impossible to make." *Collier*, 121 Wn.2d at 751.

(1992) addressed commercial speech, an area of free speech law the United States Supreme Court has arguably seen fit to segregate from all other forms of speech for special treatment. The reasoning in *National Fed'n of Retired Persons* applies solely to commercial speech. *Richmond v. Thompson*, 130 Wn.2d 368, 382, 922 P.2d 1343 (1996) concerned false and defamatory statements, a form of speech traditionally actionable at common law, and thus implicitly beyond the scope of constitutionally protected free speech.

Here Bellevue claims the provisions at issue are designed to ostensibly curb public sexual contact and prostitution, remove the secondary effects of sexually oriented businesses, and facilitate law enforcement officers' ability to detect touching between customers and performers. These claims are of the type we rejected in *Collier* as too subjective to be determinative. The provisions here facially regulate a specific subject matter – sexually oriented dance – but, to survive constitutional scrutiny, these subject matter restrictions must be narrowly tailored to serve a compelling state interest. *Collier*, 121 Wn.2d at 753. These restrictions are clearly not so tailored. Bellevue's ordinance fails the content neutrality test.

B. Compelling State Interest

Our precedent holds time, place, and manner restrictions on expressive activity are unconstitutional unless the State can demonstrate such laws are necessary to promote a *compelling* governmental interest. *O'Day*, 109 Wn.2d at 808; *Bering*, 106 Wn.2d at 234; and *Collier*, 121 Wn.2d at 753.[22] However, the trial court found only "substantial" or "important" interests, not "compelling" ones. (Deja Vu-Bellevue CP 180-81, 186-87, findings of fact

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[22] By contrast, as noted above, the cases upon which the majority bases its decision are federal cases arising under the First Amendment, *see* Majority at 127 and 128 (citing *United States v. O'Brien*, 391 U.S. 367, 377, 88 S. Ct. 1673, 20 L. Ed. 2d 672 (1968); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 565, 111 S. Ct. 2456, 115 L. Ed. 2d 504 (1991) (plurality opinion)), despite the fact that the majority is ostensibly analyzing this ordinance under our state constitution.

31-34, 36, conclusions of law 9 and 10) ("The City's adult cabaret ordinances are designed to serve substantial governmental interests."). Unfortunately the majority has only perpetuated the error. Since a *compelling* interest was neither found nor concluded by the trial court the regulations facially fail the compelling interest test.

C. Alternative Channels of Communication

The third and final element of our state constitutional test "requires that a time, place, and manner restriction leave open ample alternative channels for communication." *Collier,* 121 Wn.2d at 759. The issue is not whether these dancers can find another job (Majority at 140), it is whether this form of communication will be "regulated" out of existence by Bellevue's ordinance.

In Bellevue the subject ordinances have effectively shut down adult cabarets. The rigid proximity and lighting requirements take the fun out of this entertainment to the extent it is no longer commercially viable.[23]

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[23] Perhaps . . . the striptease makes so little contribution to the marketplace of ideas that it can be suppressed even though it is an expressive activity formally akin to the highest forms of art. But here we risk being misled by metaphor. "Marketplace of ideas," useful short-hand though it is for the domain of the First Amendment, leaves out not only nude dancing but also the greater part of art, as well as much of politics, of journalism, of education, of philosophy, of law, and in short of nonscientific discourse generally, for such discourse is heavily rhetorical, emotive. To observe that ordinances forbidding nude dancing in bars "do not prohibit an

The majority rejects the argument that the trial court erred when it excluded evidence of the ordinance's adverse impact on the economy. But economic impact is the most direct measure of a value placed on an activity by the paying public. If this ordinance did not have an adverse economic impact I am sure the clubs and dancers would not be here. They are the best judges of what is good for their business – not the government or this court.

Destruction of economic viability is the consequence of governmental regulation which first destroys the *value* of the expression. Under our state constitutional analysis such evidence is extremely pertinent to the viability of a restriction on free speech in the sense of providing alternatives. Implicit in a determination as to whether ample alternative channels of communication exist is whether such alternatives are *practically* available. *Collier,* 121

> exchange of ideas which might tend to bring about political or social change," *Yauch v. State,* 109 Ariz. 576, 579, 514 P.2d 709, 712 (1973), or that "it is difficult to conceive of ideas entitled to First Amendment protection which can be solely – or even best – expressed by baring the anus or genitals," *Kew v. Senter,* 416 F. Supp. 1101, 1105 (N.D. Tex. 1976), is correct; it just misses the point. Art and popular entertainment are not awkward or failed attempts to communicate ideas, and the protection of the First Amendment is not limited to ideas.

Miller v. Civil City of South Bend, 904 F.2d 1081, 1097-98 (7th Cir. 1990) (Posner, J., concurring), *cert. granted by Barnes v. Glen Theatre, Inc.,* 498 U.S. 807, 111 S. Ct. 38, 112 L. Ed. 2d 15 (1990), *and judgment reversed by* 501 U.S. 560, 111 S. Ct. 2456, 115 L. Ed. 2d (1991).

Wn.2d at 760. "Alternatives are not 'alternatives' if they are far from satisfactory." *Id.* If the business venue which these performers use to provide entertainment goes out of business because of restrictive ordinances, such as those in question, and no satisfactory alternative method for this type of communication is available, this entertainment will simply not be available to the public. Driving this kind of entertainment to extinction seems to be the real goal of these ordinances, although they are dressed up to appear to only regulate.[24]

The United States Supreme Court has recognized the role financial incentives play in certain forms of speech when, absent these incentives, there would be no financial reason for the speaker to convey his or her message. In *United States v. National Treasury Employees Union*, 513 U.S. 454, 115 S. Ct. 1003, 1014, 130 L. Ed. 2d 964 (1995), the Court found a ban on honoraria received by federal employees imposed a significant burden on expressive activity because the lack of compensation forced the employees "to curtail their expression if they wish[ed] to continue working for the Government." *Id.* at 1014. Likewise in *Simon & Schuster, Inc. v. New York Crime Victims Bd.*, 502 U.S. 105, 115, 112 S. Ct. 501, 508, 116 L. Ed. 2d 476 (1991) the Court invalidated New York's "Son of Sam" law, which confiscated the proceeds from the sale of a

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[24] *See* testimony of Bob Wyrich, Representative of Washington Together Against Pornography ("Mr. Wyrich urged the [City] Council to retain the four-foot rule regarding table dancing and *indicated that adult entertainment establishments will go out of business if the existing regulations are strictly enforced.*") (emphasis added). Ex. 32 (City of Bellevue City Council, Summ. of Minutes of Regular Session (Sept. 6, 1994)).

book by a felon as violative of the First Amendment. There the Court noted, "[a] statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech." *Id.* at 115.

The ordinance at issue here was directed at only one type of speech, and it restricted the economic viability of adult cabarets so effectively that it drove all adult cabarets in Bellevue out of business and caused others not to open at all. The government's ability to impose such financial burdens on speech "raises the specter that the government may effectively drive certain ideas or viewpoints from the marketplace." *Id.*[25] "It should be remembered that the pamphlets of Thomas Paine were not distributed free of charge." *Murdock v. Commonwealth*, 319 U.S. 105, 111, 63 S. Ct. 870, 874, 87 L.Ed. 1292, 146 A.L.R. 81 (1943). Nor could a free press survive if its publications could not be sold to the public. The ordinance therefore also fails the third and final test for constitutional validity enunciated in *Collier*.

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[25] The recent communist government in Nicaragua denied newsprint to newspapers which did not tow the communist line. JOHN SPICER NICHOLS, THE MEDIA, IN NICARAGUA, THE FIRST FIVE YEARS 183, 186 (Thomas W. Walker ed., 1985) (commenting how, with the exception of "a brief thaw in late 1983," *La Presna*, the key opposition news was continually denied access to newsprint during the first five years of Sandinista rule). Freedom of economic activity is often a predicate to the exercise of other liberties.

III.

Attorney Fees

An appropriate award of reasonable attorney fees in a case such as this is critical. An award against private parties can cripple those who would defend their liberties. An award for the private parties may encourage them to resist, and thus vindicate the most important public interest of all, protection of our constitutional rights.

The trial court awarded reasonable attorney fees to Bellevue, but limited the fees to $5,000, the amount of the bond the court had required the dancers to post. The majority remands this issue to the trial court for a new award.

But the trial court should not have awarded *any* fees to Bellevue because this case was initiated by the dancers under 42 U.S.C. §§ 1983 and 1988, which preempts any state law permitting recovery of attorney fees by prevailing defendants.

State law is preempted by federal law when there is an actual conflict between the two so that compliance with both laws is physically impossible, or when a state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. *Inlandboatmen's Union v. Department of Transportation*, 119 Wn.2d 697, 702, 836 P.2d 823 (1992). Under federal law, prevailing defendants in a civil rights action are not entitled to attorney fees unless the claim is frivolous, unreasonable, or without foundation. *Vernon v. City of Los Angeles*, 27 F.3d 1385, 1402 (9th Cir.), *cert. denied*, 115 S. Ct.

510, 130 L. Ed. 2d 417 (1994). The purpose of § 1988 is to ensure effective access to the judicial process for persons with civil rights grievances. *Hensley v. Eckerhart*, 461 U.S. 424, 429, 103 S. Ct. 1933, 1937, 76 L. Ed. 2d 40 (1983).[26]

In *Varney v. O'Brien*, 147 Mich. App. 397, 383 N.W.2d 213, 217 (1985), government defendants in a § 1983 suit claimed they were entitled to § 1988 attorney fees because the civil rights plaintiff had rejected a mediation award. Under Michigan law, the plaintiff was therefore required to pay the actual costs of litigation. That plaintiff succeeded on only one of four claims against defendants, and even then was awarded damages of only $1.00. *Id.* at

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[26] In enacting § 1988, Congress rejected the traditional assumption that private choices whether to litigate, compromise, or forgo a potential claim will yield a socially desirable level of enforcement as far as the enumerated civil rights statutes are concerned.

> "All of these civil rights laws depend heavily upon private enforcement, and fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these laws contain.
>
> "In many cases arising under our civil rights laws, the citizen who must sue to enforce the law has little or no money with which to hire a lawyer. If private citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must recover what it costs them to vindicate these rights in court."

Hensley, 461 U.S. at 444-45 (Brennan, J., concurring in part and dissenting in part) (footnote omitted) (quoting S. Rep. No. 94-1011, Report 2 (1976)).

217. The court classified the issue as "the interplay between a federal statute which awards this plaintiff attorney fees and a local court rule which awards them to the defendants." *Id.* It concluded

> the effectiveness of 42 U.S.C. § 1988 would be undermined if the rejection of a mediation award that turned out to be more favorable than the judgment the plaintiff eventually received prevented the plaintiff from getting an award of attorney fees. . . . [B]ecause Congress through 42 U.S.C. § 1988 has expressed a desire to encourage private enforcement of civil rights, we conclude that the local court rule upon which defendants rely has been preempted and, therefore, defendants are not entitled to recover attorney fees.

Id. at 217-18.

Likewise, in *East-Bibb Twiggs Neighborhood Ass'n v. Macon-Bibb Planning & Zoning Comm'n*, 674 F. Supp. 1475, 1477 (M.D. Ga. 1987), *aff'd*, 888 F.2d 1576 (11th Cir. 1989), the federal district court dismissed a defendant's counterclaim for abusive litigation based on state law in a federal civil rights action. The court noted that if state law counterclaims of abusive litigation were allowed to be asserted in federal causes of action, they would have a "tremendous 'chilling-effect' on the assertion of these federally created rights." *Id.* at 1477. The court concluded that the defendant's state law counterclaim did not state a cause of action "because the underlying dispute arises out of 42 U.S.C. § 1983. 42 U.S.C. § 1988 and Rule 11 provide defendant . . . with the exclusive remedy for abusive litigation. . . . " *Id.*

In *Birenbaum v. Dawson*, 1996 WL 531741 (Ky. App., Sept. 20, 1996), the plaintiff moved for attorney fees after successfully pursuing judgment under the federal civil rights laws against members of the state Board of Medical Licensure. The board contended that it had absolute immunity from any forms of monetary liability pursuant to Kentucky statutory law. The court stated "Notwithstanding the language of these statutes, it is clear that § 1988, as a federal enactment, preempts any inconsistent state statute, rule, or common law doctrine under the Supremacy Clause, Article VI, clause 2, of the United States Constitution, and therefore controls the disposition of the attorney fees question." *Id.* at *4; *see also Collins v. Thomas*, 649 F.2d 1203, 1205-06 (5th Cir. 1981) (holding that § 1988 prevailed over a Texas statute forbidding enforcement of judgments against counties), *cert. denied*, 456 U.S. 936, 102 S. Ct. 1992, 72 L. Ed. 2d 455 (1982); *Gates v. Collier*, 616 F.2d 1268, 1270-71 (5th Cir. 1980) (holding that a Mississippi statute that prohibited satisfaction of judgments against the State in absence of legislative authorization was trumped by § 1988).

If we apply these considerations to the current case, Bellevue, even as a prevailing defendant, is entitled to no reasonable attorney fees under the state common law rule upon which the majority relies because it is preempted by federal law. *See Vernon*, 27 F.3d at 1402. Nor can Bellevue recover under § 1988 because the dancers' claims in this case were not frivolous, unreasonable, or without foundation. *See id.*

Because the dancers did not prevail on their *federal* claims on appeal, the majority also refuses to award attorney fees to the clubs under § 1988, even though the

clubs have met "the low threshold for prevailing party status" by successfully appealing a related state law claim concerning the 14-day delay in issuing a manager's license. The majority again runs afoul of the purpose of § 1988 as well as applicable United States Supreme Court precedent.

In *Maher v. Gagne*, 448 U.S. 122, 132 n.15, 100 S. Ct. 2570, 65 L. Ed. 2d 653 (1980), the Supreme Court held that a plaintiff who had prevailed on a claim not specifically covered by § 1988 may still be entitled to attorney fees under the act: "The legislative history makes it clear that Congress intended fees to be awarded where a pendent constitutional claim is involved, even if the . . . claim on which the plaintiff prevailed is one for which fees cannot be awarded under the Act." *Id.* at 2576 n.15. Federal courts will consider a plaintiff to have prevailed on the merits for the purpose of the recovery of fees when the plaintiff prevails on a state law question if the plaintiff's civil rights claim was substantial, and the successful court claim arose from the same nucleus of facts. *Id.* (citing H. R. Rep. No. 94-1558, at 4 n.7 (1976)); *see also Exeter-West Greenwich Reg'l Sch. Dist.*, 788 F.2d 47, 50-51 (1st Cir. 1986) (noting victory in a civil rights suit is typically a practical, rather than a strictly legal matter). Here, the clubs' claims were undeniably substantial, and their state constitutional claim arose from the same facts upon which the federal claim was brought. The clubs, not Bellevue, should therefore recover their reasonable attorney fees under § 1988 because they meet the "prevailing party" standard. *See also Morales v. City of San Rafael*, 96 F.3d 359, 363 (9th Cir. 1996) (prevailing plaintiff is entitled to remand for determination of attorney fees under § 1988

even though damage award, while far lower than plaintiff sought, was not nominal and award achieved "significant nonmonetary result not only for [plaintiff] but for the community in general").

IV.

Conclusion

The City of Bellevue has effectively regulated adult cabarets out of existence. It has done this through the use of ordinances that are not narrowly tailored and do not serve a compelling state interest. Our state constitution says no to this ordinance and so do I.

JOHNSON, J., concurs with SANDERS, J.

IN THE SUPERIOR COURT OF THE
STATE OF WASHINGTON
IN AND FOR KING COUNTY

INO INO, INC., Plaintiff, v. CITY OF BELLELVUE, Defendant.	NO. 95-2-02025-9
DEJA-VU BELLEVUE, INC., a Washington corporation, Plaintiff, v. CITY OF BELLEVUE, Defendant.	No. 94-4-22796-3
RONDA REMUS, et al., Plaintiffs, v. CITY OF BELLEVUE, Defendant.	No. 94-2-27797-9 AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW

THIS MATTER came on for hearing before this Court on March 13-20, 1995, on plaintiffs' motions for preliminary injunction. The preliminary injunction hearing was consolidated with the trial on the merits under Civil Rule 65(a)(2). Plaintiffs Ino Ino, Inc., Remus, Silva, and McKnight were represented by Gilbert H. Levy. Plaintiff

Deja Vu-Bellevue, Inc. was represented by Jack R. Burns of Burns & Hammerly. Defendant City of Bellevue was represented by Stephen A. Smith and Robert B. Mitchell of Preston Gates & Ellis. Having heard all of the testimony and reviewed all of the evidence, the Court now makes its findings of fact and enters its conclusions of law.

FINDINGS OF FACT

1. Plaintiffs Remus, Silva and McKnight are entertainers licensed to perform in adult cabarets in the City of Bellevue. Plaintiff Ino Ino, Inc. operates an adult cabaret in Bellevue known as "Papagayo's." Plaintiff Deja Vu-Bellevue, Inc. plans to open one or more adult cabarets in Bellevue under the name "Deja Vu-Bellevue." Ino Ino, Inc. and Deja Vu-Bellevue are Washington corporations licensed in Bellevue.

2. Defendant City of Bellevue (the "City") is a municipality located in King County, Washington, which licenses and regulates adult cabarets and the entertainers and managers of such cabarets.

3. Beginning in the 1984, the City began to study adult entertainment businesses, including adult cabarets. The City's Planning Commission held public hearings and reviewed various studies and other evidence regarding the regulation of such cabarets. The Planning Commission included three persons (Lukens, Blacker, and Hague) who, by 1993, were members of the Bellevue City Council. [Lukens; Exhibits 32 and 33]

4. In September 1987 the Planning Commission wrote a study discussing the adverse secondary effects of adult entertainment establishments, including live cabarets. The Commission concluded that police research from Detroit, Cleveland, Kent and Bothell showed increased crime in areas with adult entertainment uses, including prostitution and other sexual misconduct. The Commission heard testimony on September 16, 1987, from Seattle Police Lt. Lee Bartley and Bothell Deputy Chief Rudy Plancich concerning adverse secondary effects associated with non-alcoholic adult entertainment clubs. That testimony cited numerous arrests for prostitution, various forms of sexual misconduct (e.g., illegal contact), and other crimes. Lt. Bartley proposed that the City adopt regulations that would limit the proximity of live dancers to patrons. The Planning Commission's study and conclusions were transmitted to the City Council on January 11, 1988. [Ex. 33, Vol. I, tab 2; Lukens] At this point the city had no negative effects from the three adult uses in existence.

5. The city made no findings about adult entertainment clubs and focussed on the zoning of such businesses to avoid adverse effects on the surrounding community.

6. In November 1993 the City Council adopted the City's first adult cabaret ordinance, Ordinance 4602. That ordinance contained specific recitals that the City was committed to preserve "constitutionally protected forms of expression" and that the ordinance should not be construed to prohibit such expression. The ordinance was enacted, according to a recital, "because in the absence of such regulation, significant criminal activity has historically and regularly occurred." [Lukens; Ex.3]

7. In the summer of 1994, the City undertook a study of adult cabarets in the neighboring jurisdictions. Corporal Tony Dempsey of the Bellevue Police Department visited several area cabarets and discussed law enforcement problems with Detective J.P. Covey of King County Police and representatives of the Tukwila and Everett police departments. Based on his observations and the experience of the other jurisdictions, Corporal Dempsey concluded that adult cabarets were likely to produce prostitution, public sexual conduct and other crimes. He reported this to his superiors. [Dempsey, Covey; Ex.12]

8. Corporal Dempsey's findings were included in information provided to the City Council before its meeting on September 6, 1994. City staff and at least some City Council members also had access to a narrative report by Pierce County police alleging substantial illegal conduct (e.g., drug dealing, prostitution and other sexual conduct) at an adult entertainment club. [Riordan; Blacker; Ex. 12, 14, 16 and 32] Council member Lukens had not seen the narrative while Council member Blacker was not sure if she saw it before the ordinance was passed.

9. The City Council enacted Ordinance 4692 on September 6, 1994. That ordinance revised Ordinance 4602 by, among other things, establishing a minimum distance of eight feet for nude or partially nude performances; a minimum distance of four feet for any dance performance or exhibition off-stage (e.g., table or couch dances); and a minimum lighting requirement of 30 lux. [Lukens, Blacker; Ex. 1, 5]

10. The City established an eight-foot minimum distance between nude stage dancers and patrons and required a 36" rail separating patrons from such dancers after conducting a test which showed that a "seven foot" police officer might be able to touch the dancer on stage. [Riordan, Lukens]

11. During undercover operations, police officers purchased individually compensated adult cabaret dances, whether termed table dances, couch dances, or taxi dances. Performed in close proximity in conditions of low light, there were many examples of improper exposure of genitals, sexual contact, and some acts of prostitution. [Covey, Gillis, Dempsey, Thibert, Kleinknecht; Exhibits 24, 32 and 33] There was no present or historical evidence in court (or to the City Council) of any improper touching on stage of nude dancers by patrons.

12. There was no evidence of unwanted or unexpected touching of dancers as a problem in any club.

13. The City established a four-foot minimum separation between entertainers performing non-stage dances and members of the public to place them just out of arm's reach and to permit visibility as to inappropriate sexual contact during dances. Consistent with this intent, the City interprets the four-foot standard as applying torso to torso. [Lukens, Riordan]

14. The City utilized Bellevue police officers and a lighting engineer to devise a lighting standard that would allow visibility to managers and law officers to adequately enforce ordinances in an adult cabaret. Based upon tests, they determined that a minimum of 30 lux on

10 foot centers would be appropriate. [J.D. Armstrong Declaration]

15. The City's predominate purpose in enacting its adult cabaret ordinances was to control the secondary effects associated with live adult entertainment. Before acting, the City received input from a variety of sources, including counsel for Deja Vu, an organization known as Washington Together Against Pornography, and citizens interested in the legislative process. The City has not attempted to put plaintiffs out of business or to prevent protected expression. [Blacker, Lukens]

16. The City found that the secondary effects associated with adult cabarets, including on-premises sexual contact, are not associated to the same degree with non-adult establishments. [Lukens, Riordan] Not all adult entertainment establishments have negative effects any greater than other nighttime establishments. There was substantial testimony that other establishments, particularly those which serve alcohol have greater negative effects than adult cabarets, especially as to assaults, car prowls, etc.

17. Papagayo's began operating as an adult cabaret in January 1995. A club called "Babes" (having at least some owners in common with Ino Ino, Inc.) opened in December 1994 providing female entertainers; it switched to male entertainers in 1995. Babes has operated as an unlicensed adult cabaret.

18. After Babes and Papagayo's opened, numerous instances of improper sexual conduct were reported by Bellevue police officers. This included exposure of genitals and breasts by entertainers within four feet of a

member of the public, and entertainers' fondling of customers' genitals. Some entertainers rubbed their buttocks into the groin areas of undercover officers. Several of the Bellevue officers stated that the lighting in the clubs was so low that they had difficulty seeing whether violations were occurring elsewhere in the club. The distance between performer and patron, when less than four feet, also inhibited their ability to detect ordinance violations or other illegal conduct unless they were very close to the violation. [Declarations of Hanna, Rasko, McIvor and Hoffman; testimony of Thibert and Kleinknecht]

19. King County police have conducted a variety of enforcement activities against adult entertainment clubs in King County. The clubs are owned by either the Deja Vu chain or persons associated with the Colacurcio family of Seattle. Following a six-week undercover investigation of one club in late 1991, Detective J.P. Covey made approximately 20 arrests, including three or four for prostitution and 12 for illegal sexual contact. In an undercover operation by King County in 1993, 161 table dances were purchased. Of these, 160 contained either sexual contact or other violation. Nine prostitution cases were prepared as a result of this investigation, but when one defendant was murdered, only eight were presented for filing. The number of charges which could be brought for violations of adult entertainment ordinances in King County is limited only by the manpower available in law enforcement. [Covey, Gillis] There was virtually no evidence of convictions for any of these alleged activities. Detective Covey indicated more prostitution arrests at the Red Lion in South King County than in his years of surveillance of the adult entertainment clubs in the same area. The 1991 and

1993 investigations by Detective Covey and King County did not involve the Deja Vu club located in Lake City (now Lake Forest Park).

20. The 1993 King County investigation included the videotaping of activities at "sugar's," Mr. Colacurcio's establishment in north King County. An unedited videotape shot on October 5, 1993, showed Detective Mike Gillis purchasing and receiving three $20 couch dances, which her termed "typical" $20 dances. The videotape showed the exposure of an entertainer's breasts and genitals, the placing of breasts into a detective's face, and the rubbing of his genitals with an entertainer's hand, leg and buttocks. [Gillis; Ex. 24]

21. The lighting in the videotape was augmented by a neon sign above Det. Gillis's head, which has since been removed. The tape showed and the officers testified that it was difficult to determine whether contact occurred at couch dances involving other patrons, due to low lighting, the angle of sight, and the proximity of patron and entertainer. [Gillis, Covey; Ex.24]

22. Entertainers in adult cabarets typically operate as independent contractors. They sign contracts with the adult cabaret or an associated talent agency requiring them to perform nude or semi-nude and to pay rent, which typically amounts to $65 or more per shift. [Bern, Ebert, McKnight]

23. As one entertainer performs on stage, typically nude, other entertainers who are partially clothed solicit and perform table dancers. There may be 50 or more entertainers performing simultaneously, only one of

whom is on the stage. One or two managers track who is performing couch dances. [Bern]

24. Entertainer rents are the largest source of revenue for adult cabaret operators. Operators do not compensate entertainers. They claim that, if they did so, they would lose money. [Bern, Ebert] The four foot distance will affect the revenue the dancer could expect to make. This is a disincentive to work at the club which affects the rents and revenue for the club as well.

25. During stage dances, entertainers perform for patrons from 8 to 40 or more feet away from the stage. The entertainers convey an erotic, sensual message that is perceived by patrons at that distance. The eight-foot distance from the stage to the nearest patron at Papagayo's has allowed entertainers to convey their erotic, sensual message to patrons sitting beyond that distance. [Silva, McKnight, Wheeler] The only difference between the 6 foot and 8 foot minimum is the loss of some seating. [Ebert]

26. Papagayo's has not complied with the City's four-foot restriction on table and couch dance. Babes has not offered four-foot table dances, either. The table and couch dancing that has occurred at Babes and Papagayo's has been performed from four feet to less than one foot from the patron, and it has included exposure, touching, and sexual contact. It is difficult to determine the extent of contact because of the lighting and proximity of the entertainer and patron. [Ebert, Weisert, McKnight, Kleinknecht, Thibert and Wheeler]

27. Table dancing involves movement by the dancer and the use of space to create a sense of erotic intimacy.

The smell and "heat" emanating from a dancer constitute conduct; they may be involuntary. Sexual conduct does not constitute dance. A dancer's movements can be performed at a distance of four feet from the patron's torso and still convey an erotic, sensual message. If the dancer is farther away, the patron can see the dancer's entire body and expressive activity. [Daniels] The distance does have some effect on eye contact and language heard over the loud music.

28. Entertainers may sit or stand next to, converse with, and touch patrons without violating an ordinance.

29. Increasing the light in the non-stage areas of an adult cabaret allows patrons to see dancers performing table or couch dances more clearly. It also facilitates detection of improper conduct by managers and police officers. [Bern, Kleinknecht, Covey]

30. Deja Vu-Bellevue's lighting expert conceded that a minimum illumination level of 10-15 lux would be appropriate. Papagayo's has not met even that level, according to test reports compiled by the City using a grid of readings taken on ten-foot centers and testing on March 16, 1994. Papagayo's has chosen recently to employ almost entirely red lights. If some of those lights were interspersed with white light bulbs, the lux readings would be significantly higher. Candles on tables would also affect the reading. [Kildow, Monson; Ex. 41 and 42; Court's site view]

31. The City has a substantial interest in protecting minors that is served by the identification and registration provisions in the adult cabaret ordinance, as well as

the City's prohibition of publicly visible nude performances and displays thereof. [Blacker]

32. The City has a substantial interest in assuring the correct identification of persons working in adult cabarets. It has found that aliases are especially common in than industry and identity cards are easily faked. The licensing requirements in the City's ordinance further its interest in assuring proper identification. [Blacker, Riordan, Hanson, Monson]

33. The City has a substantial interest in deploying its law enforcement resources in an effective manner. These resources are limited, particularly with respect to undercover investigations. Knowing criminal histories and prior license suspensions helps the City to focus its enforcement efforts where violations are more likely to occur. [Hanson, Covey, Riordan, Monson]

34. The City has a substantial interest in detecting and discouraging the involvement of organized crime in the adult entertainment industry. Such involvement has occurred elsewhere in the country. Persons associated with adult cabarets in the Puget Sound area have operated behind fronts and been convicted of income tax evasion. [Lukens, Riordan, Whitehead, Calacurcio]. There was no evidence to indicate the involvement of organized crime in the plaintiff organizations.

35. The licensing requirements in the City's ordinance, including required disclosures from applicant control persons, further its interest in detecting the involvement of organized crime in adult cabarets. [Riordan]

36. The City has a substantial interest in avoiding the transmission of sexually transmitted diseases and otherwise discouraging public sexual contact. [Lukens]

37. The information that the City's ordinance requires of applicants for adult cabaret licenses, entertainer licenses, and manager licenses is not intimate information. Most of it is public. [Riordan, Monson; Ex. 36 and 37]

38. Since January 1, 1995, the City has issued licenses to 69 adult cabaret entertainers. The City has issued temporary licenses immediately to these entertainers while their applications were being processed. No entertainer has been denied a license. [Monson]

39. It often takes 14 days to process an application for an entertainer or a manager's license. The City does not delay issuing any license, but rather does so as soon as it is processed or 14 days whichever is sooner. [Monson]

40. The City's license requirements have not deterred adult cabaret owners or entertainers from applying to be licensed. [Bern, Monson]

41. The City does not have discretion as to whether it will issue a license in response to a fully completed application, but must do so. [Riordan, Monson]

42. Neither Ino Ino, Inc. nor Deja Vu-Bellevue, Inc. has any plans to offer male entertainment. Ino Ino, Inc. representatives had no objection to the City's prohibition of male entertainers or employees appearing in public with their genitals in a discernibly turgid state. [Bern, Ebert]

43. Neither Ino Ino, Inc. nor Deja Vu-Bellevue, Inc. has plans to place any representation or to present any performance that is visible outside their premises displaying the breasts below the top of the areola, the pubic hair, buttocks, genitals, or anus. [Ebert, Bern]

44. The closing hour mandated by the City's ordinance (2:00 a.m.) is the same as that required by Everett and Federal Way. The City adopted that time because 2:00 a.m. is the closing time for bars, and the City feared that allowing inebriated patrons to enter adult cabarets at that hour would lead to problems. [Bern, Blacker]

45. Although plaintiffs allege that the City's minimum distance and lighting requirements will prevent them from doing business, there is no evidence that they have attempted to conduct business under the requirements. [Ebert, Weisert]

46. There is a direct relationship between the revenue earned by the club and the number of dancers working. If dancers earn less revenue because of fewer patrons and less tips they will not work at that club. This effects the employability of other personnel at the clubs such as waitresses, security people, managers, etc., as well as the rents earned by the club.

CONCLUSIONS OF LAW

1. Consolidation of the hearing on plaintiffs' application for a preliminary injunction with the trial on the merits of the claims presented is appropriate pursuant to CR 65(a)(2).

2. To the extent that the Court has been asked to resolve in this proceeding fewer than all of the claims raised by the plaintiffs, the Court finds that it is appropriate to enter final judgment with respect to those claims raised and resolved herein. There is no just reason for delay of entry of such judgment under CR 54(b), because substantial issues in this case are resolved herein and the enforcement activities of the City as they affect plaintiffs require a prompt and final adjudication. The Court hereby directs entry of judgment on those claims.

3. Stage, table, and couch dances are entitled to protection under Article I, section 5 of the Washington State Constitution. *JJR, Inc. v. City of Seattle*, ___ Wn.2d ___ (March 23, 1995)

4. The City is entitled to rely on prior studies of other jurisdictions in determining the adverse effects of adult entertainment establishments. *Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1985). Alternatively or additionally, the City may demonstrate its need for its ordinances with evidence presented at trial. *BSA, Inc. v. King County*, 804 F.2d 1104, 1111 (9th Cir. 1986). The City may reasonably rely upon such evidence as relevant to the problems such as sexual contact that the City is seeking to address, even though the evidence is anecdotal and unscientific. There was little evidence as to additional secondary effects, such as degradation of the neighborhood, drop in property values, or unusual amount of other crime in the area.

5. Allegedly improper legislative motives are irrelevant to the issues presented in this case, because the City has a valid regulatory purpose and its regulations are

justified without reference to the content of regulated speech. *Renton*, 475 U.S. at 48. The lobbying efforts by Washington Together Against Pornography were in no way improper.

6. Plaintiffs have not demonstrated entitlement to a preliminary injunction because there is no clear legal right to a finding that the City's adult cabaret ordinance is unconstitutional, nor a showing that an immediate invasion of protected rights will occur in the absence of injunctive relief. An injunction will not issue in a doubtful case. *Federal Way Family Physicians, Inc. v. Tacoma Stands Up for Life*, 106 Wn.2d 261, 265 (1986).

7. The City's requirement that unclothed dancers and dancers exposed as defined in BCC 5.08.070(A)(1) perform on stage elevated at least eighteen inches from the floor and separated from patrons by a railing and an eight-foot distance, BCC §§ 5.08.070(A)(1)&.070(D)(1), is constitutional. *Kev, Inc. v. Kitsap County*, 793 F.2d 1053, 1061-62 (9th Cir. 1986) (upholding 10-foot distance requirement under similar challenge). Apart from a test involving a tall police officer, the City Council considered no evidence or study in implementing the change from 6 feet to 8 feet.

8. The City's requirement that no employee or entertainer perform any dance, performance or exhibition in or about the non-stage area of the adult cabaret unless at a distance of no less than four feet from *his or her customer*, BCC § 5.08.070(A)(6), is constitutional. *O'Day v. King Co.*, 109 Wn.2d 796 (1988) (6-foot distance requirement aimed at keeping entertainer and patron out of reach is constitutional). Neither dancer nor manager

should have to worry about proximity as to persons who are not connected to the dance or exhibition. The Court finds no evidence to support a legislative finding that requires distance from other members of the public during a table dance. To preserve the constitutionality of this section, the ordinance should be interpreted as so limited.

9. These distance and separation requirements do not regulate expression but rather conduct. Entertainers may perform any non-obscene expressive activity at or beyond the minimum distance. Conduct is not protected under either the Washington Constitution, Article 1, section 5, or the First Amendment to the United States Constitution. *O'Day*, 109 Wn.2d at 809-10. The City has a substantial interest in prohibiting public sexual contact. *Id.*; *Everett v. Heim*, 71 Wn. App. 392, 396 (1993). Regulation of the proximity between entertainers and patrons in adult cabarets is a reasonable exercise of the City's authority. *Id.* However, the four foot distance, if that were the legal standard, is not the least restrictive means as identified per the City Attorney of Bellevue.

10. Because these distance and separation requirements regulate pure conduct, there is no need to engage in an analysis considering the distance and separation requirements as time, place or manner restrictions. *O'Day*, 109 Wn.2d at 810. Even if such an analysis were undertaken, the City's distance and separation requirements would satisfy the analysis. The City's adult cabaret ordinances are designed to serve substantial governmental interests. *City of Renton*, 475 U.S. at 50. The distance and separation requirements allow communication at the prescribed distance and do not significantly impair

the ability of dancers to engage in protected expression. *Id.*; *Kev*, 793 F.2d at 1061-62.

11. The City's adult cabaret ordinance is not generally unconstitutionally overbroad. BCC ch.5.08 permits the full gamut of potentially expressive conduct, subject only to the requirements (1) that the expression not be obscene, (2) that entertainers not commit specified sexual acts, and (3) that licensees comply with conduct regulations such as minimum distance and lighting requirements. The sexual acts of entertainers forbidden by the ordinance are pure, unprotected conduct. *Chisman*, 33 Wn. App. at 813; *O'Day*, 109 Wn.2d at 807. BCC 5.08.070A(5) must be construed to permit simulated sexual acts as long as they are not obscene. Because the City's ordinance does not regulate constitutionally protected speech or expressive conduct, this Court need not examine whether the ordinance prohibits a real and substantial amount of protected conduct in contrast to its plainly legitimate sweep. *State v. Halstein*, 122 Wn.2d 109, 122-23 (1993).

12. The definition of "obscene" in the ordinance, BCC § 5.07.080(G), is not overbroad. The definition properly requires a determination that material or activity is "patently offensive" to be made according to "community standards." *State v. Reece*, 110 Wn.2d 766, 771-73 (1988).

13. The regulation of obscenity is within the City's powers and has not been preempted by the State of Washington. Washington Constitution Art. 11, § 11; *Tacoma v. Luvene*, 118 Wn.2d 826, 833 (1992).

14. The provisions of the City's adult cabaret ordinance are not unconstitutionally vague. Plaintiffs have

not met their burden of proving beyond a reasonable doubt their allegations of vagueness. *Halstein*, 122 Wn.2d at 118. Specifically, plaintiffs have not demonstrated that any provision of the ordinance is framed in terms so vague that persons of common intelligence must necessarily guess at their meaning and differ as to their application. *O'Day*, 109 Wn.2d at 810.

15. BCC §§ 5.08.040(B)(1) and 5.08.010(D) are not unconstitutionally vague. "Applicant control person" must be construed in accordance with Washington law, as a person with a significant management interest similar to an owner or manager. *World Wide Video v. Tukwila*, 117 Wn.2d 382, 391-92 (1991).

16. BCC § 5.08.070(A)(5) is not unconstitutionally vague. The prohibition of the performance of "actual or simulated acts of sexual conduct" is subject to the exception for nonobscene expression, and therefore gives plaintiffs sufficient notice of what conduct is prohibited. *O'Day*, 109 Wn.2d at 811.

17. BCC § 5.08.070(A)(6) is not unconstitutionally vague. Persons of common intelligence do not need to guess at the meaning of "four feet." The four-foot distance requirement is measured torso to torso, from the dancer to the customer.

18. The City's minimum illumination requirement for adult cabarets is constitutional. The illumination requirement does not significantly affect expression. The illumination requirement regulates only conduct and is reasonably related to a legitimate City purpose. *World Wide Video*, 117 Wn.2d at 392. The requirement is based upon a need for visibility in law enforcement which need

not be proven absolutely. In devising a legislative solution, the City has broad latitude to regulate, and a court will not substitute its judgment for that of a legislative body. *Adult Entertainment v. Pierce Co.*, 57 Wn. App. 435, 439 (1990). The ordinance *does not* require 30 lux at all points within the public areas.

19. The minimum illumination requirement is also constitutional even if analyzed as a time, place, or manner restriction. The illumination requirement is content neutral, narrowly tailored to serve a substantial state interest, and leaves open ample alternative channels of communication. *Renton*, 475 U.S. 41, 47. In terms of the analogous test established under *United States v. O'Brien*, 391 U.S. 367 (1968), the requirement is within the constitutional power of the government; it furthers an important governmental interest; that interest is unrelated to the suppression of free expression; and the incidental restriction on first amendment freedoms is no greater that is essential to the furtherance of that interest – i.e., the requirement "promotes a substantial government interest that would be achieved less effectively absent the regulation." *Kev*, 793 F.2d at 1059 n.3, quoting *United States v. Albertini*, 472 U.S. 675, 689 (1985). The plaintiffs have not met their burden in showing that the lighting requirement interferes with expression or that it is unrelated to a substantial governmental interest.

20. The City's licensing requirements, BCC §§ 5.08.020, .030, .040, .050 and .060, are valid.

21. The City's licensing requirements do not raise concerns under Washington Constitution article 1, § 5 or the First Amendment to the United States Constitution,

because they do not inhibit the plaintiffs' ability or inclination to engage in protected expression. *Kev*, 793 F.2d at 1060.

22. The 14-day waiting period for an adult cabaret manager's license is neither unreasonable nor an impermissible prior restraint. *Worldwide Video*, 117 Wn.2d at 392-93. Managers are not engaged in protected expression activities.

23. There is no evidence that the licenses required to operate, manage, or perform in an adult cabaret are unduly difficult to obtain or that persons have been discouraged from seeking them.

24. The ordinance provides adequate standards to guide City officials in processing license applications.

25. The disclosure requirements of the ordinance directly relate to the City's substantial interest in protecting public health, safety and welfare by deploying law enforcement forces to mitigate the secondary impacts associated with adult entertainment establishments. *World Wide Video*, 117 Wn.2d at 391-92; *TK's Video, Inc. v. Denton County*, 24 F.3d 705, 709 (5th Cir. 1994).

26. The City is entitled to ask all license applicants about their criminal convictions in the past five years, and to ask all cabaret license applicants about their recent employment history. This information facilitates record checks, enables the City to deploy enforcement resources in the most effective manner, and advances the City's interest in preventing the infiltration of organized crime into adult cabarets. *Bayside Enterprises, Inc. v. Carson*, 470 F. Supp. 1140, 1148 (M.D. Fla. 1979); *Kev*, 793 F.2d at 1061.

27. The disclosure requirement in BCC § 5.08.040 do not violate plaintiffs' privacy rights. Disclosure of other licenses, business history, recent criminal convictions and employment history does not invade the realm of intimate personal information. *Halstein*, 122 Wn.2d at 125 n.8. Plaintiffs' privacy interest in confidentiality, to the extent such an interest exists at all, is not a fundamental right. *O'Hartigan v. Dept. of Personnel*, 118 Wn.2d 111, 117 (1991). The interests of the City are legitimate, and the City has demonstrated that its disclosure requirements are designed to achieve those interests. *Id.* at 118. The questions asked of licensees are no more intrusive than reasonably necessary to achieve the City's legitimate interests.

28. The plaintiffs have not challenged the City's license fees, found in BCC § 5.08.050.

29. BCC § 5.08.060 is not a prior restraint. The City may constitutionally require licensing of adult cabarets, adult cabaret managers, and adult cabaret entertainers, may constitutionally prohibit adult cabarets and adult cabaret managers from operating without a license, whether or not judicial review is pending, and may constitutionally require disappointed applicants to be responsible for initiating judicial review of any denial of a license. *Kev*, 793 F.2d at 1059; *TK's Video*, 24 F.3d at 708-09. The ordinance provides for prompt final judicial review.

30. The adult cabaret ordinances do not violate constitutional guarantees of equal protection. Plaintiffs' equal protection claim is based on the City's failure to impose the same limitations on entertainers in other

establishments that it imposes on entertainers in adult cabarets. The City is not prevented by the First or Fourteenth Amendments to the United States Constitution, or by Article 1 § 5 of the Washington Constitution, from classifying and regulating adult-oriented establishments differently from other places of entertainment. *O'Day*, 109 Wn.2d at 813-15; *Heim*, 71 Wn. App. at 399-400; *Broadway Books, Inc. v. Roberts*, 642 F. Supp. 486, 490 (E.D. Tenn. 1986)

31. The City's classification satisfies rational basis scrutiny. The ordinance applies to all entertainers and employees in adult cabarets. The City has demonstrated a reasonable basis for distinguishing adult cabarets from other places of public entertainment: the secondary effects associated with adult cabarets, including on premises sexual contact, are not associated with other entertainment establishments. The City's classification bears a rational relationship to the purpose of the ordinance in protecting the public health and safety of the City. *Heim*, 71 Wn. App. at 399-400; *Young v. American Mini Theaters*, 427 U.S. at 70-71.

32. The prohibition on the use of nude persons or images of nude persons outside adult cabarets, BCC § 5.08.070(B)(2), is unconstitutional because it is not limited to that which is obscene or harmful to minors, nor mentioned in 5.08.070(F).

33. Section 5.08.070(F) is constitutional because it permits non-obscene expression including simulated acts. (Ordinance No. 4645.)

34. The tipping restrictions contained in BCC § 5.08.070(A)(7) are constitutional and are not unconstitutional time, place and manner restrictions. *Kev*, 793 F.2d at 1061-62.

35. The provision of the City's ordinance requiring that adult cabarets be closed between 2:00 a.m. and 10:00 a.m., BCC § 5.08.070(E), is not an unconstitutional time, place, and manner restriction. *Mitchell v. Comm'n on Adult Entertainment Establishments*, 10 F.3d 123, 131-39 (3d Cir. 1993). The closing hours requirement is a content-neutral restriction, and it promotes a substantial government interest that would be achieved less effectively absent the regulation.

36. Valid regulations may have an adverse economic impact on a business or occupation, but that does not limit a government's power to regulate. *Bolser v. Liquor Control Board*, 90 Wn.2d 223, 230, (1978). None of the plaintiffs are excluded from a business or occupation or prevented from charging a fee for services.

37. The availability of other civil, criminal, or licensing remedies does not affect the power of the city council to legislate in this area, or the constitutionality of this ordinance.

38. Plaintiffs are denied a preliminary or permanent injunction. BCC 5.08.150 contains a severability clause for

the limited portion of the ordinance found to be unconstitutional. The temporary restraining order entered by this Court on February 24, 1995, is hereby dissolved.

ENTERED this 24th day of April, 1995.

/s/ Carol Schapira
Judge Carol Schapira
King County Superior Court

The Honorable Carol A. Schapira

IN THE SUPERIOR COURT OF THE
STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

INO INO, INC., Plaintiff, v. CITY OF BELLEVUE, Defendant.	No. 95-2-02025-9 ORDER AWARDING ATTORNEYS' FEES

This matter came on for hearing on defendant's motion for an award of its attorneys' fees and costs. The Court has reviewed the materials submitted in support of and in opposition to defendant's motion and has heard argument. Now, therefore,

IT IS ORDERED, ADJUDGED AND DECREED that defendant City of Bellevue be, and it hereby is, awarded the sum of $3,333.33 as reasonable attorneys' fees in this matter. Plaintiff's and defendant's claims for fees under 42 U.S.C. §1988 are denied. Supersedeas is set at $10,000 plus the amount of the judgment.

DATED this ___ day of May, 1995.

/s/ Carol A. Schapira
THE HONORABLE
CAROL A SCHAPIRA

Presented by:

PRESTON GATES & ELLIS

By /s/ Robert B. Mitchell
Stephen A. Smith, WSBA # 08039
Robert B. Mitchell WSBA # 10874

Attorneys for Defendant City of Bellevue

Copy received; approved as to form:

/s/ Gilbert H. Levy,
Gilbert H. Levy, WSBA # 04805

Attorney for Plaintiffs Ronda Remus,
Esmeralda Silva, and Victoria McKnight

The Honorable Carol A. Schapira

IN THE SUPERIOR COURT OF THE
STATE OF WASHINGTON

IN AND FOR THE COUNTY OF KING

RONDA REMUS, et al., Plaintiffs, v. CITY OF BELLEVUE, Defendant.	No. 94-2-27797-9 ORDER AWARDING ATTORNEYS' FEES AND COSTS

This matter came on for hearing on defendant's motion for an award of its attorneys' fees and costs. The Court has reviewed the materials submitted in support of defendant's motion, as well as defendant's cost bill, and has heard argument. Now, therefore,

IT IS ORDERED, ADJUDGED AND DECREED that defendant City of Bellevue be, and it hereby is, awarded the sum of $ 0 as reasonable attorneys' fees and $459.40 as taxable costs in this matter. Plaintiffs' and defendant's motions for fees under 42 U.S.C. § 1988 are denied. Supersedeas is set at $10,000. plus the amount of the judgment.

DATED this ___ day of May, 1995.

/s/ Carol A. Schapira
THE HONORABLE
CAROL A. SCHAPIRA

Presented by:

PRESTON GATES & ELLIS

By /s/ Robert B. Mitchell
Stephen A. Smith, WSBA # 08039
Robert B. Mitchell WSBA # 10874

Attorneys for Defendant City of Bellevue

Copy received; approved as to form:

/s/ Gilbert H. Levy
Gilbert H. Levy, WSBA # 04805

Attorney for Plaintiffs Ronda Remus, Esmeralda Silva, and Victoria McKnight

No. 62941-2

IN THE SUPREME COURT

OF THE STATE OF WASHINGTON

Ino Ino, Inc,
Rhonda Remus, Esmeralda Silva, Victoria McKnight
Respondents,

v.

City of Bellevue
Appellant.

APPEAL FROM KING COUNTY SUPERIOR COURT
No. 95-2-02025-9

OPENING BRIEF OF RESPONDENTS

Gilbert H. Levy
WSBA No. 4805
Attorney for Respondents

GILBERT H. LEVY
200 Market Place Two
2001 Western Avenue
Seattle, WA 98121
(206) 443-0670

* * *

The trial committed error in entering findings of fact 7, 13, 15, 18, 20, 25, 26, 27, and 45.

Issue related to Assignment of Error No. 5

Are the findings of fact referred to in this assignment of error supported by substantial evidence.

Assignment of Error No. 6

The Trial Court committed error in awarding attorneys fees to Bellevue.

Issue related to Assignment of Error No 6

Is the Washington law allowing an award of attorney fees for improper issuance of a temporary restraining order preempted by the standard for awarding fees to prevailing defendants under Title 42 United States Code § 1988, and did Bellevue's claim for attorney fees come within that standard?

Assignment of Error No. 7

The Trial Court committed error in declining to award attorneys fees to the Respondents.

Issue related to Assignment of Error No 7

Are the Respondents entitled to an award of attorney fees pursuant to 42 U.S.C. § 1988.

* * *

J. The Trial Court Committed Error in Entering Findings of Fact 7. 13. 18. 20. 25. 26. 27 and 45.

Findings of fact are not subject to attack on appeal if supported by substantial evidence. *Doe v. Boeing Co.*, 121 Wn.2d 8, 846 P.2d 531 (1993). Based upon the statement of facts set forth in this brief, and based upon the record, the Plaintiffs maintain that these findings are not supported by substantial evidence. Furthermore, because of the nature of the issues involved in this appeal, this Court is not bound to defer to the Trial Court's findings. The

reviewing Court will make its own independent examination of the record when fundamental constitutional rights are involved. *State v. Mak*, 105 Wn.2d 692, 712, 718 P.2d 407 (1986); *McNear v. Ray*, 65 Wn.2d 530, 535, 398 P.2d 732 (1965).

K. The Trial Court Erred in Awarding Attorney Fees to the Defendant.

The Trial Court entered an order awarding attorney fees and costs to the Defendant. ICP 46. The award was based on case law authorizing costs and attorney fees incurred in dissolving a wrongfully issued temporary injunction. *Seattle Fire Fighters Union v. Hollister*, 48 Wn. App. 129, 138, 737 P.2d 1302 (1987). This lawsuit was brought under the Federal Civil Rights Act and the federal statute authorizes an award of fees to prevailing defendants, pursuant to Title 42 U.S.C. § 1988, only where the Plaintiff's claim was "frivolous, unreasonable or groundless," or "when the plaintiff continued to litigate after it clearly became so". *Christianburg Garment Co. v. EEOC*, 434 U.S. 412, 422, 54 L. Ed. 2d 648 (1978); *Hutchison v. Staton*, 994 F.2d 1076, 1080 (4th Cir. 1993). The Plaintiffs maintain that the stricter federal standard for awarding attorney fees to prevailing defendants preempts the more liberal standard in the Washington case law, which was the basis for awarding fees to the Defendant.

State law is preempted by federal law when there is an actual conflict between the two, manifested either: 1) when it is impossible to comply with both federal and state regulation; or 2) where the state law is an obstacle to the purposes and objectives of Congress. *Inland Boatman v. Department of Transportation*, 119 Wn.2d 697, 702, 707,

836 P.2d 823 (1992). The objectives and purposes of Congress in enacting § 1988 was to make competent counsel available to civil rights plaintiffs. *Blanchard v. Bergeron*, 489 U.S. 96, 103 L. Ed. 2d 67, 109 S. Ct. 939 (1989). In *East-Bibb Twiggs Neighborhood Association v. Macon-Bibb Planning and Zoning Commission*, 674 F. Supp 1475 (1987), *aff'd* 887 F.2d 1576 (11th Cir. 1989), the District Court dismissed a state law based counter claim for abusive litigation brought in a federal civil rights action, reasoning that this would have a "tremendous chilling effect" on the assertion of federal constitutional rights. Many causes of action would go unchallenged because of the fear of these sanctions. *Id.* at 1476, 1477. The Plaintiffs submit that the liberal standard under which fees were awarded to the Defendant in this case is inconsistent with the objective underlying the federal statute to encourage competent counsel to vigorously litigate civil rights claims and state law is for that reason preempted.

The Defendant made no showing that the Plaintiffs' claims were frivolous, unreasonable or groundless, as required by Title 42 U.S.C. § 1988, and they are not entitled to any attorney fees.

L. The Plaintiffs Are Entitled to an Award of Attorney Fees.

If the Plaintiffs are successful in this appeal, they are entitled to an award of their fees and costs pursuant to Title 42 U.S.C. § 1988. *See, JJR Inc. v. Seattle, supra.*

* * *

THE SUPREME COURT OF WASHINGTON

INO INO, INC., DEJA VU-BELLEVUE, RONDA REMUS, et al., Respondents, v. THE CITY OF BELLEVUE, Appellant.	NO. 62941-2 (consol. w/62939-1 and 62940-4) **ORDER DENYING MOTIONS FOR RECONSIDERATION** (Filed Aug. 21, 1997)

The Court having considered the Respondent's Motions for Reconsideration and the Appellant's Answer to the Motions, and Respondent's Motion to File Reply to the Answer; and having entered an Order Changing Opinion on this date;

Now, therefore, it is hereby

ORDERED:

That the Respondent's Motion to File Reply to the Answer is denied. The Respondent's Motions for Reconsideration are denied.

DATED at Olympia, Washington this 21st day of August, 1997.

/s/ Duhan C.J.
CHIEF JUSTICE

IN THE SUPERIOR COURT OF THE
STATE OF WASHINGTON

IN AND FOR THE COUNTY OF KING

INO INO, INC., Plaintiff, v. CITY OF BELLEVUE, Defendant.	No. 95-2-02025-9
DEJA-VU BELLEVUE, INC., a Washington corporation, Plaintiff, v. CITY OF BELLEVUE, Defendant.	No. 94-2-22796-3
RONDA REMUS, et al., Plaintiffs, v. CITY OF BELLEVUE, Defendant.	No. 94-2-27797-9 AMENDED JUDGMENT

THIS MATTER having come before this Court after the issuance of the Mandate by the Washington Supreme Court, awarding costs and directing a recalculation of the trial court attorneys' fees awarded to the City of Bellevue, and the Court having considered the Mandate and the

original motion for attorneys' fees filed by the City and the absence of objection to the amount so claimed, now, therefore,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment for the City of Bellevue in this action shall be amended to include in addition to the trial court costs of $1,378.20, attorneys' fees in the trial court of $34,114.00, and costs in the Supreme Court of $680.33, and that this Amended Judgment shall be awarded jointly and severally against the defendants herein.

JUDGMENT SUMMARY

A. Judgment Creditors: City of Bellevue
B. Judgment Debtors: Ino Ino, Inc.; Ronda Remus, Esmeralda Silva and Victoria McKnight; Deja Vu-Bellevue, Inc.
C. Principal Judgment Amount.....$36,172.53
D. Interest to Date of Judgment.....$ -0-
E. Credit Against Judgment for Payments Made.....$ -0-
F. Attorney's Fees.....Included above
G. Costs .....Included above
H. Other Recovery Amount .....$ -0-
I. Principal judgment shall bear interest at 12% per annum.
J. Attorney's fees, costs and other recovery amounts shall bear interest at 12% per annum.
K. Attorney for Judgment Creditors: Preston Gates & Ellis LLP
L. Attorney for Judgment Debtors: Gilbert H. Levy
Jack R. Burns

ENTERED this OCT 14 1997 day of October, 1997.

/s/ CAROL A. SCHAPIRA
JUDGE

Presented By:

PRESTON GATES & ELLIS

By /s/ Stephen A. Smith
Stephen A. Smith, WSBA # 08039
Robert B. Mitchell, WSBA # 10874

Attorneys for Defendant
City of Bellevue

Copy Received; Notice of Presentation Waived:

LAW OFFICES OF GILBERT H. LEVY

By /s/ Gilbert H. Levy
Gilbert H. Levy, WSBA # 4805

Attorney for Plaintiffs Ino Ino, Inc. & Remus, et al.

Copy Received; Notice of Presentation Waived:

JACK R. BURNS, P.S.

By /s/ Jack R. Burns
Jack R. Burns, WSBA #01590
Attorney for Plaintiff Deja-Vu Bellevue, Inc.

IN THE SUPERIOR COURT OF WASHINGTON
IN AND FOR KING COUNTY

Ino Ino, Inc., a Washington corporation, Plaintiff, vs. City of Bellevue, a municipal corporation, Defendant.	NO. 95-2-02025-9 COMPLAINT FOR INJUNCTION AND DECLARATORY RELIEF AND DAMAGES

I. INTRODUCTORY STATEMENT

1.1 This is an action seeking injunctive and declaratory relief and damages against the City of Bellevue's Adult Cabaret Licensing Ordinance, Bellevue Ordinances 4692, 4695 and 4735. The Plaintiff maintains that these ordinances violate rights afforded by the First and Fourteenth Amendments to the United States Constitution and Article 1, Sections 3, 5, 12 and 16 of the Washington Constitution.

II. PARTIES

2.1 The Plaintiff is a Washington Corporation in good standing.

2.2 The Defendant City of Bellevue is a municipal corporation organized under the laws of the State of Washington.

III. JURISDICTION AND VENUE

3.1 The Defendant maintains offices and transacts business in King County, Washington. The acts complained of herein have occurred and will continue to occur in King County, Washington.

IV. FACTUAL BASIS OF THE CLAIM

4.1 The Plaintiff is the tenant in possession of property located at 2239 148th Avenue NE, Bellevue, Washington. At that location, the Plaintiff has commenced operation of a nightclub featuring nude stage dancing and erotic entertainment. The Plaintiff currently holds an adult cabaret license issued by the City of Bellevue.

4.2 The Plaintiff has recently commenced operation of its business. After the Plaintiff obtained its license and before the Plaintiff commenced its business operations, the Defendant City of Bellevue enacted Ordinance 4692. A true and correct copy of that ordinance is attached hereto and incorporated by reference herein as Exhibit "A". The ordinance amends and adds additional sections to Bellevue City Code, (hereinafter BCC), § 5.08.010 *et seq.*, which deals with the licensing and regulation of businesses known as "adult cabarets".

BCC § 5.08.010A defines a "adult cabaret" as:

> . . . any premises, including any cabaret premises, to which any member of the public is invited or admitted and where an entertainer provides adult entertainment to an member of the public.

4.3 On or about September 19, 1994, the Bellevue City Council enacted Ordinance 4695, a true and correct copy of which is attached hereto and incorporated by reference herein Exhibit "B". Ordinance 4695 further amends the standards of conduct contained in BCC § 5.08.070, which govern the conduct of employees, entertainers and managers.

4.4 On or about January 23, 1995, the Bellevue City Council enacted Ordinance 4735, a true and correct copy of which is attached hereto and incorporated by reference herein as Exhibit "C". Ordinance 4735 made additional changes to the definition of "adult entertainment" and some changes to the requirements for obtaining an adult cabaret license. Ordinance 4735 is not scheduled to go into effect until February 23, 1995.

4.5 The Plaintiff's business will provide "adult entertainment" as that phrase is defined in BCC 5.08.010(B) and the Plaintiff's business is required to continuously maintain an adult cabaret license. If the Plaintiff's business fails to obtain such a license, it will be subjected to criminal and civil penalties. 4.6 The entertainment provided by the Plaintiff's business consists of nude striptease dancing on a stage, and table dancing. Table dances are an individualized, personal dance, performed in the immediate proximity of the customer. Entertainers, who are not employees of the business, but independent contractors, are compensated directly by individual customers for the table dances that they perform. Entertainers remit a portion of their earnings to the business as rent. The format of the business as described in this paragraph is typical for similar adult entertainment businesses throughout the United States.

4.7 BCC § 5.08.070 contains the standards of conduct which are applicable to adult cabarets. If the Plaintiff's business fails to comply with the standards of conduct, it will be subjected to criminal and civil penalties, as well as license suspension and revocation.

4.8 Subsection (A)(6) of BCC § 5.08.070 provides:

> No employee or entertainer mingling with members of the public shall conduct any dance, performance or exhibition in or about the non-stage area of the adult cabaret unless that dance, performance or exhibition is performed at a distance of no less than four feet from any member of the public.

4.9 Compliance with this standard of conduct will significantly impair the aesthetics and quality of the of table dances performed by individual entertainers. This is true because individual entertainers use space as well as movement to create a sense of intimacy and rapport with individual customers. In addition the standard requiring a four foot clear distance from "any member of the public" is vague, physically impossible to comply with, and will significantly reduce the number of entertainers and customers that can be permitted in the room at one time. Bellevue City Attorney Dick Andrew testified in a public hearing relating to this ordinance that a one foot set back requirement would be sufficient to address legitimate law enforcement concerns.

4.10 Subsection (D)(2) of BCC § 5.08.070 provides:

> Lighting. Sufficient lighting shall be provided and equally distributed throughout the public areas of the premises so that all object are plainly visible at all times. A minimum lighting

level of 30 lux horizontal, measured at 30 inches from the floor and on 10 foot centers is hereby established for all areas of the adult cabaret where members of the public are admitted.

4.11 Compliance with this standard of conduct will require a level of illumination which is unaesthetic, unattractive and will significantly reduce the quality of the nightclub atmosphere which the Plaintiff will provide to members of the public. Among other things, it will make it impossible for the Plaintiff to have special lighting effects for, or "spotlight", the performance on the stage. This standard requires a much greater level of illumination than is necessary to enable law enforcement officers to plainly observe the activity of customers and entertainers.

4.12 The legislation referred to above was adopted not for the purpose of regulating the so-called secondary effects of adult cabarets but for the purpose of making it unprofitable for the Plaintiff and the entertainers to conduct their business in the City of Bellevue, in hopes that the business would close. All of the legislation referred to above was enacted in close consultation with pro-censorship groups and right wing religious groups who are hostile to adult entertainment, and without even a semblance of an effort on the part of the City to allow Plaintiff to participate in the legislative process.

4.13 If the Plaintiff were to attempt to comply with the standards of conduct referred to above, it would suffer economic injury and deprivation of free speech rights. Alternatively, if the Plaintiff fails to comply with the standards of conduct it will be subject to civil sanctions and criminal penalties. The Plaintiff is thereby faced

with irreparable injury and there is no adequate remedy at law.

V. FIRST CLAIM

5.1 The Plaintiff repeats and realleges the allegations in paragraphs 1 though 15.

5.2 The Defendant, acting under color of municipal law, will attempt to enforce Ordinances 4692, 4695 and 4735 against the Plaintiff. These ordinances or their face and as applied to the Plaintiff violate rights afforded by the First, Fifth and Fourteenth Amendments to the United States Constitution. The unconstitutional portions of the ordinances include but are not limited to the standards of conduct referred to above.

5.3 As a direct and proximate result of the Defendant's efforts to enforce an unconstitutional ordinance against the Plaintiff, the Plaintiff will suffer extinguishment of First Amendment rights and monetary damages.

5.4 Application of ordinances 4692, 4695 and 4735 to the Plaintiff constitutes a taking of property without just compensation.

5.5 The Plaintiff is entitled to injunctive and declaratory relief and damages pursuant to Title 42 United States Code, § 1983.

VI. SECOND CLAIM

6.1 The Plaintiff repeats and realleges the allegations in paragraphs 1 through 18.

6.2 The application of ordinances 4692, 4695 and 4735 to the Plaintiff constitutes a taking of private property for public use without just compensation.

6.3 Ordinances 4692, 4695 and 4735 on their face and as applied to the Plaintiff violate rights afforded by Article 1, Sections 3, 5, 12, and 16 of the Washington Constitution and the Plaintiff is entitled to injunctive and declaratory relief and damages pursuant to the applicable sections of the Revised Code of Washington. The unconstitutional portions of the ordinances include but are not limited to the standards of conduct referred to above.

VII. RELIEF REQUESTED

WHEREFORE, the Plaintiff requests that judgment be entered against the Defendant as follows: 7.1 The Court should enter an order preliminarily enjoining the Defendant, its agents and employees, from enforcing ordinances 4692, 4695 and 4735 against the Plaintiff pending trial on the merits.

7.2 Following trial on the merits, the Court should declare ordinances 4692, 4695 and 4735 unconstitutional.

7.3 Following trial on the merits, the Court should enter an order permanently enjoining the Defendant from enforcing Ordinances 4692, 4695 and 4735 against the Plaintiff.

7.4 The Court should award damages in an amount to be proven at trial.

7.5 The Court should award court costs and reasonable attorney fees to the Plaintiff pursuant to Title 42 United States Code § 1988.

7.6 The Court should award such other relief to the Plaintiff as it deems just and proper.

DATED this 27 day of January, 1995.

/s/ Gilbert H. Levy
GILBERT H. LEVY,
WSBA No. 4805
Attorney for Plaintiff

IN THE SUPERIOR COURT OF
WASHINGTON FOR KING COUNTY

RONDA REMUS, ESMERALDA SILVA and VICTORIA McKNIGHT, Plaintiffs, v. CITY OF BELLEVUE Defendant.	NO. 94-2-27797-9 **FIRST AMENDED COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF**

INTRODUCTORY STATEMENT

1. This is an action seeking injunctive and declaratory relief and damages against the City of Bellevue's Adult Cabaret Licensing Ordinance, Bellevue Ordinances 4692, 4695 and 4735. The Plaintiffs maintain that these ordinances violate rights afforded by the First and Fourteenth amendments to the United States Constitution, and Article 1, Section 3, 5, and 12 of the Washington Constitution.

PARTIES

2. The Plaintiffs reside in King County, Washington.

3. The Defendant City of Bellevue is a municipal corporation organized under the laws of the State of Washington.

JURISDICTION AND VENUE

4. The Defendant maintains offices and transacts business in King County, Washington. The acts complained of herein have occurred and will continue to occur in King County, Washington.

FACTUAL BASIS OF THE COMPLAINT

5. Plaintiffs Remus and Silva have applied for entertainers licenses to provide adult entertainment in the City of Bellevue and desire to work at Papagayo's Nightclub, 2239 -138th Avenue NE, Bellevue, Washington. Plaintiff McKnight currently holds an entertainers license issued by the City of Bellevue.

6. On or about September 6, 1994 the Bellevue City Council enacted Bellevue Ordinance 4692. A true and copy of that ordinance is attached hereto and incorporated by reference herein as Exhibit A. That Ordinance amends and adds additional sections to Bellevue City Code § 5.08.010 *et seq.*, which deal with the licensing and regulation of businesses known as "adult cabarets".

7. Bellevue City Code § 5.08.010A defines an "adult cabaret" as:

> . . . any premises, including any cabaret premises, to which any member of the public is invited or admitted and where an entertainer provides adult entertainment to any member of the public.

8. Bellevue City Code § 5.08.010B defines "adult entertainment" as:

1. Any exhibition, performance or dance of any type conducted in a premises where such exhibition, performance or dance involves a person who is unclothed or in such costume, attire or clothing as to expose any portion of the female breast below the top of the areola or any portion of the pubic region, anus, buttocks, vulva or genitals, or wearing any device or covering exposed to view which simulates the appearance of any portion of the female breast below the top of the areola or any portion of the pubic region, anus, buttocks, vulva or genitals, or human male genitals in a discernibly turgid state, even if completely and opaquely covered; or

2. Any exhibition, performance or dance conducted in a premises where such exhibition, performance or dance is performed within the view of one or more members of the public and is intended or is likely to sexually stimulate any member of the public.

9. The Plaintiffs intend to provide adult entertainment as defined in Bellevue Municipal Code § 5.08.010(B). The Plaintiffs are required to obtain licenses under Bellevue Municipal Code § 5.08070(C) and failure to obtain a license will result in the imposition of civil and criminal penalties.

10. On or about September 19, 1994, the Bellevue City Council enacted Ordinance 4695, a true and correct copy of which is attached hereto and incorporated by reference herein as Exhibit B. Ordinance 4695 further amends the standards of conduct contained in Bellevue

City Code § 5.08.070, which governs the conduct of employees, entertainers and managers at adult cabarets.

11. On about January 23, 1995, the Bellevue City Council enacted Ordinance 4735. Ordinance 4735 further amended Bellevue Municipal Code § 5.08.010 *et seq.* Ordinance 4735 is scheduled to take effect on February 23, 1995.

12. Ordinances 4692, 4695 and 4735 were enacted for a discriminatory purpose, namely to deter the Plaintiffs and members of the public from exercising free speech rights afforded by the United States and Washington Constitution. All three ordinances were enacted in close consultation with a pro-censorship organization known as Washington Together Against Pornography.

13. Ordinance 4692, 4695 and 4735 as applied to the Plaintiffs will substantially interfere with the content and quality of the dance performances in which they propose to engage. The Plaintiffs are faced with irreparable injury and there is no adequate remedy at law.

FIRST CLAIM

14. The Plaintiffs repeat and reallege the allegations in paragraphs 1 through 13.

15. The Defendant, acting under color of municipal law, will attempt to enforce Ordinances 4692, 4695 and 4735 against the Plaintiffs. Ordinances 4692, 4965 [sic] and 4735 on their face and as applied to the Plaintiffs violate rights afforded by the First and Fourteenth

amendments to the United States Constitution. The constitutional violations include but are not limited to the following:

a. The statutory scheme is overly broad.

b. The license application requires disclosure of information which is unrelated to the qualifications for obtaining a license and is unduly burdensome.

c. The license fees are excessive

d. The standards of conduct are a restriction on the content of speech and are not narrowly tailored to further a substantial governmental interest.

e. The ordinance fails to provide for prompt final judicial review or to maintain the status quo pending judicial review.

f. The ordinance unreasonably interferes with the Plaintiffs, ability to make a living.

16. As a direct and proximate result of the Defendant's efforts to enforce Ordinances 4692, 4695 and 4735 against the Plaintiffs, the Plaintiffs will suffer the deprivation of First Amendment rights afforded by the First and Fourteenth Amendments to the United States Constitution.

17. The Plaintiffs are entitled to injunctive and declaratory relief pursuant to Title 42 United States Code, § 1983.

SECOND CLAIM

18. The Plaintiffs repeat and reallege the allegations in paragraphs 1 through 13.

19. Ordinances 4692, 4695 and 4735 on their face and applied to the Plaintiffs violate rights afforded by Article 1, Sections 3, 5 and 12 of the Washington Constitution and the Plaintiffs are entitled to injunctive and declaratory relief pursuant to the applicable sections of the Revised Code of Washington.

WHEREFOR, the Plaintiffs request that judgment be entered against the Defendant as follows:

1. The Court should enter an order preliminarily enjoining the Defendant, its agents and employees, from enforcing Ordinances 4692, 4695 and 4735 against the Plaintiffs pending trial on the merits.

2. Following trial on the merits, the Court should declare Ordinances 4692 and 4695 unconstitutional and void.

3. Following trial on the merits, the Court should enter an order permanently enjoining the Defendant from enforcing Ordinances 4692 and 4695 against the Plaintiffs.

4. The Court should award court costs and reasonable attorney fees to the Plaintiff pursuant to Title 42 United States Code § 1988.

6. The Court should award such other relief to the Plaintiffs as it deems just and proper.

DATED this 27 day of February, 1995

/s/ Gilbert H. Levy
GILBERT H. LEVY,
WSBA No. 4805
Attorney for Plaintiffs

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR THE COUNTY OF KING

DEJA VU-BELLEVUE, INC., a Washington corporation,

Plaintiff,

vs.

CITY OF BELLEVUE,

Defendant.

NO. 94-2-22796-3

AMENDED COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

(Filed Oct. 3, 1994)

COMES NOW the Plaintiff, Deja Vu-Bellevue, Inc., by and through its attorney, Jack R. Burns, of **BURNS & HAMMERLY**, and seeks a Declaratory Judgment, as well as preliminary and permanent injunctions with respect to City of Bellevue Ordinance No. 4692:

> AN ORDINANCE regulating cabarets and adult cabarets and providing time limits for issuance of licenses and appeals from licensing decisions; amending Ordinance No 346, Sections 1, 3, 4, 5, 7, 8, and 9; Ordinance No 2070, Sections 3, 4, and 5; Ordinance No 4602, Sections 1, 3, 4, 6, and 7; and Bellevue City Code Sections 5.08.010, .030, .040, .060, .070, .080, .090, and .100; adding new Bellevue City Code Sections 5.08.120, .130, and .140; repealing Section 1 or Ordinance No 2094 and Bellevue City Code Section 5.08.110; and declaring an emergency which requires the ordinance be immediately effective.

as amended by Ordinance No. 4695, City of Bellevue Ordinance No. 4691 entitled:

> AN ORDINANCE regulating public conduct and prohibiting lewd conduct, amending Ordinance No. 3516, Sections 11 (part), 24 (part) and 26 (part), Ordinance No 3550, Section 3 (part) and Section 4 (part) and Bellevue City Code Sections 10A.88.010, .030 and.035, and declaring an emergency which requires the ordinance be immediately effective.

and City of Bellevue Ordinance No. 4536, enacted on or about May 24, 1993 entitled:

> AN ORDINANCE relating to adult entertainment land uses; amending Section 2 of Ordinance No. 3884 and Section 20.20.127 of the Bellevue City Code (Land Use Code).

and in support of its claims states:

I. JURISDICTIONAL

1. This is a civil action whereby Plaintiff prays for a preliminary and permanent injunction enjoining the Defendant from in any way attempting to enforce City of Bellevue Ordinance No. 4692, as amended by City of Bellevue Ordinance No. 4695, copies of which are attached hereto as Exhibits "A" and "B," City of Bellevue Ordinance No. 4691, a copy of which is attached hereto as Exhibit "C," and City of Bellevue Ordinance No. 4536 for the reason that said Ordinances, and the multiple provisions thereof, are unconstitutional as written, and/or as threatened to be applied to the Plaintiff in the case at bar. Further, Plaintiff prays for a Declaratory Judgment to determine the constitutionality of said Ordinances as

written and/or as threatened to be applied to the Plaintiff. The allegations to be set forth in the premises establish that there are presented questions of actual controversy between the parties involving substantial constitutional issues in that said Ordinances, as written and/or in their threatened application, are repugnant to the rights of the Plaintiff herein under the provisions of the Washington State and United States Constitutions.

2. Plaintiff's prayer for declaratory relief is founded on Rule 57 of the Washington Civil Rules of Procedure as well as RCW 7.24.010, et seq.

3. The jurisdiction of this Court to grant injunctive relief is conferred by RCW 7.24.080 which provides:

> Further relief based upon a declaratory judgment or decree may be granted whenever necessary or proper.

The Provisions of Civil Rule 65, providing for a preliminary and permanent injunction, further authorize this Court to grant injunctive relief consistent with the procedures set forth therein.

4. Further, this action is founded upon 42 U.S.C. Section 1983, which provides in pertinent part as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunity secured by the Constitution and the laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

II. PARTIES

1. Deja Vu-Bellevue, Inc. is a Washington Corporation, and has paid all fees due and owing to the state of Washington. Deja Vu-Bellevue, Inc. has been issued an Adult Cabaret license to do business within the City of Bellevue under the name "Deja Vu-Bellevue." Deja Vu-Bellevue will offer constitutionally protected, non-obscene, dance entertainment to interested members of the adult public. In addition, Deja Vu-Bellevue, Inc. is seeking additional locations within the City of Bellevue to open and operate adult cabarets.

2. The City of Bellevue is a Washington municipal corporation.

III. FACTUAL BACKGROUND

1. The Plaintiff has a license to operate a business within the City of Bellevue which will present dance entertainment protected by Article 1, § 5, of the Washington State Constitution and the First Amendment to the United States Constitution.

2. The Plaintiff has secured all appropriate business licenses required by the State of Washington and the City of Bellevue. The Plaintiff has made substantial monetary investments in its business and will incur additional expenses in excess of $500,000 remodeling, renovating and fixturing its business premises pursuant to plans and specifications submitted to the City of Bellevue for permit approval prior to the adoption of Ordinance Nos. 4691, 4692 and 4695.

3. The ordinances challenged here severely burden and restrict Plaintiff's right to present constitutionally protected dance entertainment to members of the adult public, place a severe economic penalty on the exercise of its right to do so, and inhibits and deters interested adult citizens from viewing such entertainment on the premises of the Plaintiff's business.

4. Plaintiff affirmatively alleges that the statutory scheme of Ordinance Nos. 4691, 4692, 4695, and 4536, as applied to Plaintiff, or as threatened to be applied to the Plaintiff, are constitutionally deficient and constitute a prohibited prior restraint and/or unconstitutional burden in violation of the Plaintiff's rights under Article I, Section 5, of the Washington State Constitution and the First Amendment to the United States Constitution.

5. Interested adult citizens of the City of Bellevue, as well as interested adult visitors to the City of Bellevue and the State of Washington, will be denied their constitutionally protected right to view and have access to constitutionally protected entertainment by the statutory scheme envisioned by said Ordinances for reasons having to do with overbreadth, vagueness, prior restraint, and unconstitutional time, place and manner regulation of protected speech.

6. Plaintiff alleges that it is entitled to declaratory relief in this matter in order to avoid the necessity of having to act at its peril or to act upon its own interpretation of what rights are available to it, or in the alternative, to abandon those rights because of the fear of incurring damages and losses in multiple lawsuits and the possibility of multiple criminal prosecutions.

IV. BASIS IN LAW FOR RELIEF

1. Plaintiff has the right to engage in the business of offering nonobscene dance entertainment to members of the public by virtue of Article 1, § 5, of the Washington State Constitution and the First Amendment to the United States Constitution.

2. The City of Bellevue Ordinances in question here are clearly repugnant to Article 1, §§ 5, 7, and 12 of the Washington State Constitution and the First and Fourteenth Amendments to the United States Constitution, as written and as threatened to be applied for the following reasons:

A. Ordinance No. 4692, as amended by Ordinance No. 4695, is a content-based regulation of speech that is not supported by a compelling governmental interest and/or fails to utilize the least restrictive means to cure any perceived evil.

B. Section 5.08.010(B) of Ordinance No. 4692 is unconstitutionally overbroad in that it sweeps within its ambit speech for which no governmental regulatory justification exits.

C. Section 5.08.040(B)(1)(a) of Ordinance No. 4692 is unconstitutionally vague and requires persons of ordinary intelligence to guess as to its meaning.

D. Section 5.08.040(B)(1)(c) of Ordinance No. 4692 constitutes a prohibited prior restraint in that the required disclosure chills persons in the exercise of guaranteed speech rights for no compelling governmental purpose. Moreover, such compelled disclosure violates

privacy rights secured by the Washington State Constitution.

E. Section 5.08.040(B)(1)(d) of Ordinance No. 4692 constitutes a prohibited prior restraint in that the required disclosure chills persons in the exercise of guaranteed speech rights for no compelling governmental purpose. Moreover, such compelled disclosure violates privacy rights secured by the Washington State Constitution.

F. Section 5.08.040(B)(1)(e) of Ordinance No. 4692 constitutes a prohibited prior restraint in that the required disclosure chills persons in the exercise of guaranteed speech rights for no compelling governmental purpose. Moreover, such compelled disclosure violated privacy rights secured by the Washington State Constitution.

G. Section 5.08.040(B)(1)(f) of Ordinance No. 4692 constitutes a prohibited prior restraint in that the required disclosure chills persons in the exercise of guaranteed speech rights for no compelling governmental purpose. Moreover, such compelled disclosure violates privacy rights secured by the Washington State Constitution.

H. Section 5.08.040(C)(1)(d) of Ordinance No. 4692 constitutes a prohibited prior restraint in that the required disclosure chills persons in the exercise of guaranteed speech rights for no compelling governmental purpose. Moreover, such compelled disclosure violates privacy rights secured by the Washington State Constitution.

I. Section 5.08.060 of Ordinance No. 4692 acts as a prohibited prior restraint inasmuch as it places the burden on an applicant denied a permit to initiate judicial review.

J. Section 5.08.070(A)(1) of Ordinance No. 4692 imposes an unconstitutional time, place and manner restriction on protected speech which is not supported by a compelling governmental interest and/or does not use the least restrictive mean to cure any perceived evil

K. Section 5.08.070(A)(2) of Ordinance No. 4692 acts as a prohibited prior restraint by prohibiting male entertainers from performing certain non-obscene performances.

L. Section 5.08.070(A)(3) or Ordinance No. 4692 imposes an unconstitutional time, place or manner regulation on protected speech activities by limiting entertainers costuming choices, is not supported by a compelling governmental interest, and fails to utilize the least restrictive means to cure any perceived evil. It also acts as a prohibited prior restraint on nonobscene performances.

M. Section 5.08.070(A)(5) of Ordinance No. 4692 is unconstitutionally vague in that it requires persons of reasonable intelligence to guess at what other acts, chapters, ordinances, or statutes they are prohibited from violating. To the extent that a license may be revoked for "any other act" in violation of unspecified chapters, ordinances, statutes, and activities unrelated to compliance with regulations of Chapter 5.08, this provision constitutes a prohibited prior restraint.

N. Section 5.08.070(A)(6) of Ordinance No. 4692 imposes an unconstitutional time, place and manner restriction on protected speech which is not supported by a compelling governmental interest and/or does not use the least restrictive mean to cure any perceived evil.

O. Section 5.08.070(A)(7) of Ordinance No. 4692, which limits the right of a clothed entertainer to accept tips directly when performing on a stage, imposes an unconstitutional time, place and manner restriction on protected speech which is not supported by a compelling governmental interest and/or does not use the least restrictive mean to cure any perceived evil.

P. Section 5.08.070(B)(2) acts as a prohibited prior restraint on nonobscene commercial speech.

Q. Section 5.08.070(D)(1) of Ordinance No. 4692 imposes an unconstitutional time, place and manner restriction on protected speech which is not supported by a compelling governmental interest and/or does not use the least restrictive mean to cure any perceived evil.

R. Section 5.08.070(D)(2) or Ordinance No. 4692 imposes an unconstitutional time, place and manner restriction on protected speech which is not supported by a compelling governmental interest and/or does not use the least restrictive mean to cure any perceived evil.

S. Section 5.08.070(E) of Ordinance No. 4692 imposes an unconstitutional time, place and manner restriction on protected speech which is not supported by a compelling governmental interest and/or does not use the least restrictive mean to curb any perceived evil.

T. The exemption found in Section 5.08.070(F) is underinclusive inasmuch as it allows the prohibition of nonobscene performance which fall within the definition of "sexual conduct."

U. The definition of obscene activity found in Section 5.08.070(G) is unconstitutionally overbroad. Moreover, the regulation of obscenity has been pre-empted by the State of Washington.

V. Section 5.08.090(A) of Ordinance No. 4692 acts as an unconstitutional prior restraint by allowing the suspension or revocation of a license to engage in protected speech based upon conduct for which a license cannot be denied and where no abuse has occurred within the jurisdiction of the licensing authority and/or on the basis of conduct of others not participated in or knowingly allowed by a licensee.

W. Section 20.20.127 of Ordinance No. 4536 imposes an unconstitutional time, place and manner restriction on protected speech because, in application, there are not ample reasonable alternative avenues of communication.

X. Section 10A.88.010(C) is unconstitutionally overbroad and violates rights of privacy guaranteed by the Fourth Amendment to the United States Constitution and Article 1, §7 of the Washington State Constitution.

Y. Section 10A.88.030(A) is unconstitutionally overbroad and violates rights of privacy guaranteed by the Fourth Amendment to the United States Constitution and Article 1, §7 of the Washington State Constitution.

Z. Section 10A.88.035(A) is unconstitutionally overbroad and acts as a prohibited prior restraint.

AA. Section 10A.88.035(B) is unconstitutionally overbroad. Moreover, the regulation of obscenity has been preempted by the State of Washington

V. IRREPARABLE HARM

1. Plaintiff herein avers that its rights afforded under Article 1, §§ 5, 7 and 12 of the Washington State Constitution and the First, Fourth and Fourteenth Amendments to the United States Constitution will be violated by said Defendant in the enforcement of said Ordinances, and unless this Court grants the relief prayed for, said Plaintiff, as well as the interested adult public, will suffer irreparable harm.

2. Plaintiff has no adequate remedy at law unless the Defendant is permanently enjoined and restrained, and all others acting in concert with in, from enforcing the provisions of said Ordinances.

3. No remedy at law will suffice to protect Plaintiff in that a money judgment would in no way reimburse Plaintiff for the loss and, indeed, the extinguishment of its constitutional rights.

4. The public interest would be served by such injunctive relief in that unless such relief is granted, the public's rights to view protected speech will have been diminished and extinguished to an irreparable extent.

5. No substantial harm will befall other parties to this civil action in that a preliminary injunction will simply preserve the status quo until such time as all parties

to this civil action may be heard by this Court and a determination of the issues involved herein be made by this Court.

6. The likelihood of Plaintiff being ultimately successful in having substantial portions of the aforementioned Ordinances declared unconstitutional is great in that said Ordinances set up a form of prior restraint and result in the obliteration of Plaintiff's and the general public's speech rights guaranteed by Article 1, §5 of the Washington State Constitution and the First Amendment to the United States Constitution.

VI. RELIEF SOUGHT

1. Plaintiff is entitled to and desires this Court to enter a Declaratory Judgment, declaring Ordinance Nos. 4691, 4692, 4695, and 4536 to be unconstitutional as written, in whole or in part, on the basis that they are repugnant to Article 1, §§ 5, 7 and 12 of the Washington State Constitution and the First, Fourth and Fourteenth Amendments to the United States Constitution.

2. Further, Plaintiff seeks a preliminary and permanent injunction to prohibit the enforcement by Defendant and/or its agents, servants, employees, attorneys, and/or others acting under its direction and control of provisions of said Ordinances.

WHEREFORE, Plaintiff prays:

1. That the Defendant be required to answer forthwith this Complaint in conformance with the rules and practices of this Court.

2. That Declaratory Judgment be rendered declaring Ordinance Nos. 4691, 4692, 4695, and 4536 to be unconstitutional as written, in whole or in part, and that this Court further declare the Ordinances to be unconstitutional in their threatened application to the Plaintiff.

3. That a Preliminary Injunction issue from this Court upon hearing, restraining the Defendant, and its agents, servants, employees, attorneys, and others acting under its direction and control, pending a hearing and determination on Plaintiff's application for a permanent injunction, from enforcing or executing, and/or threatening to enforce and/or execute the provisions of said Ordinances, in whole and/or in part.

4. That upon final hearing, this Court issue its permanent injunctions, prohibiting the Defendant and/or its agents, servants, employees, attorneys, and/or others in concert with them, from enforcing said Ordinances, in whole or in part, because of the patent unconstitutionality thereof.

5. That upon final hearing, this Court award to the Plaintiff such damages as it shall have sustained, together with the expenditure to enforce and protect the rights guaranteed to it under the United States Constitution, their reasonable attorney's fees pursuant to 42 U.S.C. Section 1988, and such other damages as may be established at the time of trial.

DATED this 29th day of September, 1994.

/s/ Jack R. Burns
JACK R. BURNS
WSBA #01590
Attorney for Plaintiff

CITY OF BELLEVUE, WASHINGTON

ORDINANCE NO. 4735

AN ORDINANCE amending Ordinance No. 346, Sections 1, 2, 4, and 8; Ordinance No. 2070, Sections 3, 4, and 5; Ordinance No. 4602, Sections 1, 2, 4, 6, and 7; Ordinance No. 4692, Sections 1, 3, 5, 6, and 8; Ordinance No. 4695, Section 1; and Bellevue City Code Sections 5.08.010, .020, .040, .060, .070, and .090; clarifying regulation of adult entertainment; and providing time limits for issuance of licenses and appeals from licensing decisions.

WHEREAS, the City Council finds it necessary to modify regulations for adult cabaret businesses to clarify definition, licensing and appeal provisions, increase their enforceability, and eliminate certain portions of existing regulations, Now, Therefore,

THE CITY COUNCIL OF THE CITY OF BELLEVUE, WASHINGTON, DOES ORDAIN AS FOLLOWS:

Section 1. Ordinance No. 346, Section 1, Ordinance No. 4602, Section 1, Ordinance No. 4692, Section 1 and Bellevue City Code Section 5.08.010 are hereby amended to read as follow:

5.08.010 Definitions.

A. "Adult Cabaret" means:

Any commercial premises, including any cabaret premises, to which any member of the public is invited or admitted and where an entertainer provides live adult entertainment to any member of the public.

B. "Adult Entertainment" means:

1. Any exhibition, performance or dance of any type conducted in a premises where such exhibition, performance or dance involves a person who is unclothed or in such costume, attire or clothing as to expose any portion of the female breast below the top of the areola or any portion of the pubic region, anus, buttocks, vulva or genitals, or wearing any device or covering exposed to view which simulates the appearance of any portion of the female breast below the top of the areola or any portion of the pubic region, anus, buttocks, vulva or genitals, or human male genitals in a discernibly turgid state, even if completely and opaquely covered;

or

2. Any exhibition, performance or dance of any type conducted in a premises where such exhibition, performance or dance is distinguished or characterized by a predominant emphasis on the depiction, description, simulation or relation to the following specified sexual activities:

(a) human genitals in a state of sexual stimulation or arousal;

(b) acts of human masturbation, sexual intercourse or sodomy; or

(c) fondling or other erotic touching of human genitals, pubic region, buttocks or female breast;

or

3. Any exhibition, performance or dance which is intended to sexually stimulate any member of the public and which is conducted on a regular basis or as a substantial part of the premises activity. This includes, but is not limited to, any such exhibition, performance or dance performed for, arranged with or engaged in with fewer than all members of the public on the premises at that time, with separate consideration paid, either directly or indirectly, for such performance, exhibition or dance and which is commonly referred to as table dancing, couch dancing, taxi dancing, lap dancing, private dancing or straddle dancing.

C. "Applicant" means the individual or entity seeking a cabaret license in the City of Bellevue.

D. "Applicant control persons" means: All partners, corporate officers and directors and any other individuals in the applicant's business organization who hold a significant interest in the adult cabaret business, based on responsibility for management of the adult cabaret business.

E. "Cabaret" means any room, place or space whatsoever in the city in which any music, singing, dancing or other similar entertainment is permitted in connection with any hotel, restaurant, cafe, club, tavern, eating place, directly selling, serving or providing the public, with or without charge, food or liquor. The words "music and entertainment" as used herein shall not apply to radios or mechanical devices.

F. "Clerk" shall mean such city employees or agents as the city manager shall designate to administer this chapter, or any designee thereof.

G. "Employee" means any and all persons, including managers, entertainers, and independent contractors who work in or at or render any services directly related to the operation of any cabaret.

H. "Entertainer" means any person who provides adult entertainment within an adult cabaret as defined in this section, whether or not a fee is charged or accepted for such entertainment.

I. "Liquor" means all beverages defined in RCW 66.04.200.

J. "Manager" means any person who manages, directs, administers or is in charge of the affairs and/or conduct of any portion of any activity involving adult entertainment occurring at any adult cabaret, and includes assistant managers working with or under the direction of a manager to carry out such purposes.

K. "Operator" means any person operating, conducting or maintaining an adult cabaret.

L. "Person" means any individual, partnership, corporation, trust, incorporated or unincorporated association, marital community, joint venture, governmental entity, or other entity or group of persons, however organized.

M. "Member of the public" means any customer, patron, club member, or person, other than an employee as defined in this section, who is invited or admitted to a cabaret.

N. "Sexual conduct" means acts of (a) sexual intercourse within its ordinary meaning, occurring upon any penetration, however slight; or (b) any penetration of the vagina or anus, however slight, by an object; or (c) any contact between

persons involving the sex organs of one person and the mouth or anus of another; or (d) masturbation, manual or instrumental, of oneself or of one person by another; or (e) touching of the sex organs or anus, whether clothed or unclothed, of oneself or of one person by another.

Section 2. Ordinance No. 346, Section 2, Ordinance No. 4602, Section 2, and Bellevue City Code Section 5.08.020 are hereby amended to read as follows:

5.08.020 License required.

A. It is unlawful for any person to conduct, manage or operate a cabaret unless such person is the holder of a valid and subsisting license from the city to do so, obtained in the manner provided in this chapter.

B. It is unlawful for any person to conduct, manage or operate an adult cabaret unless such person is the holder of a valid and subsisting license from the city to do so, obtained in the manner provided in this chapter.

C. It is unlawful for any entertainer, employee or manager to knowingly work in or about, or to knowingly perform any service or entertainment directly related to the operation of an unlicensed adult cabaret.

D. It is unlawful for any entertainer to perform in an adult cabaret unless such person is the holder of a valid and subsisting license from the City to do so.

E. It is unlawful for any manager to work in an adult cabaret unless such person is the holder of

a valid and subsisting license from the City to do so.

Section 3. Ordinance No. 346, Section 4, Ordinance No. 2070, Section 5, Ordinance No. 4602, Section 4, and Bellevue City Code Section 5.08.040 are hereby amended to read as follows:

5.08.040 Application.

A. Cabaret License. Any person desiring a cabaret license required under the provisions of this chapter shall file written application with the clerk on forms provided by the clerk for that purpose. All applications shall be signed by the applicant and notarized or certified as true under penalty of perjury. A failure to provide all information required on the form will constitute an incomplete application and will not be processed. The clerk upon presentation of a complete application and before acting upon the same shall refer such application to the police department for a full investigation as to the truth of the statements contained therein, and as to any or all other matters which would aid the clerk in determining whether or not such application should be granted. After the police department has reported back to the clerk the result of such investigation, and within fourteen days of the date of filing of the complete application, if the clerk is satisfied that the statements contained in such application are true and that the applicant meets all requirements of this chapter, the clerk shall issue the license applied for, provided however, that if the application does not meet the requirements of this code, then the clerk shall deny such license application.

B. Adult Cabaret License.

1. All applications for an adult cabaret license shall be submitted to the clerk in the name of the person or entity proposing to conduct an adult cabaret on the business premises and shall be signed by such person and certified as true under penalty of perjury. All applications shall be submitted on a form supplied by the City, which shall require the following information:

   a. For the applicant and for each applicant control person, provide: Names, any aliases or previous names, driver's license number, if any, social security number if any, and business, mailing, and residential address, and business telephone number.

   b. If a partnership, whether general or limited; and if a corporation, date and place of incorporation, evidence that it is in good standing under the laws of Washington, and name and address of any registered agent for service of process.

   c. Whether the applicant or any partner, corporate officer, or director of the applicant holds any other licenses under this chapter or any license for similar adult entertainment or sexually oriented business, including motion picture theaters and panoramas, from the City or another city, county or state, and if so, the names and addresses of each other licensed business.

   d. A summary of the business history of the applicant and applicant control persons

in owning or operating the adult entertainment or other sexually oriented businesses, providing names, addresses and dates of operation for such businesses, and whether any business license or adult entertainment license has been revoked or suspended, and the reason therefor.

e. For the applicant and all applicant control persons, any and all criminal convictions or forfeitures within five (5) years immediately preceding the date of the application, other than parking offenses or minor traffic infractions including the dates of conviction, nature of the crime, name and location of court and disposition.

f. For the applicant and all applicant control persons, a description of business, occupation or employment history for the three (3) years immediately preceding the date of the application.

g. Authorization for the City, its agents and employees to seek information to confirm any statements set forth in the application.

h. The location and doing-business-as name of the proposed adult cabaret, including a legal description of the property, street address, and telephone number, together with the name and address of each owner and lessee of the property.

i. Two (2) two inch by two inch color photographs of the applicant and applicant control persons, taken within six months

of the date of application showing only the full face.

j. A complete set of fingerprints for the applicant or each applicant control person, by Bellevue Police Department employees.

k. A scale drawing or diagram showing the configuration of the premises for the proposed adult cabaret, including a statement of the total floor space occupied by the business, and marked dimensions of the interior of the premises. Performance areas, seating areas, manager's office and stations, restrooms and service areas shall be clearly marked on the drawing. An application for a license for an adult cabaret shall include building plans which demonstrate conformance with Bellevue City Code Section 5.08.070.

2. An application shall be deemed complete upon the applicant's provision of all information requested above, including identification of "none" where that is the correct response, and the applicant's verification that the application is complete. The Clerk may request other information or clarification in addition to that provided in a complete application where necessary to determine compliance with this chapter.

3. A non-refundable application fee must be paid at the time of filing an application in order to defray the costs of processing the application.

4. Each applicant shall verify, under penalty of perjury that the information contained in the application is true.

5. If any person or entity acquires, subsequent to the issuance of an adult cabaret license, a significant interest based on responsibility for management or operation of the licensed premises or the licensed business, notice of such acquisition shall be provided in writing to the City Clerk, no later than twenty-one (21) days following such acquisition. The notice required shall include the information required for the original adult cabaret license application.

6. The adult cabaret license, if granted, shall state on its face the name of the person or persons to whom it is issued, the expiration date, the doing-business-as name and the address of the licensed adult cabaret. The permit shall be posted in a conspicuous place at or near the entrance to the adult cabaret so that it can be easily read at any time the business is open.

7. No person granted an adult cabaret license pursuant to this chapter shall operate the adult cabaret business under a name not specified on the license, nor shall any person operate an adult cabaret under any designation or at any location not specified on the license.

8. Upon receipt of the complete application and fee, the clerk shall provide copies to the police, fire, and community development departments for their investigation and

review to determine compliance of the proposed adult cabaret with the laws and regulations which each department administers. Each department shall, within thirty days of the date of such application, inspect the application and premises and shall make a written report to the clerk whether such application and premises complies with the laws administered by each department. No license may be issued unless each department reports that the application and premises comply with the relevant laws. In the event the premises is not yet constructed, the departments shall base their recommendation as to premises compliance on their review of the drawings submitted in the application. Any adult cabaret license approved prior to premises construction shall contain a condition that the premises may not open for business until the premises have been inspected and determined to be in substantial conformance with the drawings submitted with the application. A department shall recommend denial of a license under this subsection if it finds that the proposed adult cabaret is not in conformance with the requirements of this chapter or other law in effect in the city. A recommendation for denial shall cite the specific reason therefor, including applicable laws.

9. An adult cabaret license shall be issued by the clerk within thirty days of the date of filing a complete license application and fee, unless the clerk determines that the applicant has failed to meet any of the requirements of this chapter or provide any information required under this subsection

or that the applicant has made a false, misleading or fraudulent statement of material fact on the application for a license. The clerk shall grant an extension of time in which to provide all information required for a complete license application upon the request of the applicant. If the clerk finds that the applicant has failed to meet any of the requirements for issuance of an adult cabaret license, the clerk shall deny the application in writing and shall cite the specific reasons therefor, including applicable law. If the clerk fails to issue or deny the license within thirty days of the date of filing of a complete application and fee, the applicant shall be permitted, subject to all other applicable law, to operate the business for which the license was sought until notification by the clerk that the license has been denied, but in no event may the clerk extend the application review time for more than an additional 20 days.

C. Adult Cabaret Manager and Entertainer Licenses.

1. No person shall work as a manager, assistant manager or entertainer at an adult cabaret without an entertainer's or manager's license from the City. Each applicant for a manager's or entertainer's license shall complete an application on forms provided by the City containing the information identified below. A non-refundable application fee of $100 shall accompany the application. A copy of the application shall be provided to the Police Department for its review, investigation and recommendation. All applications

for a manager's or entertainer's license shall be signed by the applicant and certified to be true under penalty of perjury. The manager's or entertainer's license application shall require the following information:

a. The applicant's name, home address, home telephone number, date and place of birth, fingerprints taken by Bellevue Police Department employees, social security number, and any stage names or nicknames used in entertaining.

b. The name and address of each business at which the applicant intends to work.

c. Documentation that the applicant has attained the age of eighteen years. Any two of the following shall be accepted as documentation of age:

   i. a motor vehicle operator's license issued by any state bearing the applicant's photograph and date of birth;

   ii. a state issued identification card bearing the applicant's photograph and date or [sic] birth;

   iii. an official passport issued by the United States of America;

   iv. an immigration card issued by the United States of America; or

   v. any other identification that the City determines to be acceptable.

d. A complete statement of all convictions of the applicant for any misdemeanor or felony violations in this or any other city, county, or state within five (5) years

immediately preceding the date of the application, except parking violations or minor traffic infractions.

e. A description of the applicant's principal activities or services to be rendered.

f. Two (2) two inch by two inch color photographs of applicant, taken within six months of the date of application showing only the full face.

g. Authorization for the City, its agents and employees to investigate and confirm any statements set forth in the application.

h. Every adult entertainer shall provide his or her license to the adult cabaret manager on duty on the premises prior to his or her performance. The manager shall retain the licenses of the adult entertainers readily available for inspection by the City at any time during business hours of the adult cabaret.

2. The Clerk may request additional information or clarification when necessary to determine compliance with this chapter.

3. An adult cabaret manager's or an adult entertainer's license shall be issued by the clerk within 14 days from the date the complete application and fee are received unless the clerk determines that the applicant has failed to provide any information required to be supplied according to this chapter, has made any false, misleading or fraudulent statement of material fact in the application, or has failed to meet any of the requirements

for issuance of a license under this chapter. If the clerk determines that the applicant has failed to qualify for the license applied for, the clerk shall deny the application in writing and shall cite the specific reasons therefor, including applicable laws. If the clerk has failed to approve or deny an application for an adult cabaret manager's license within fourteen days of filing of a complete application, the applicant may, subject to all other applicable laws, commence work as an adult cabaret manager in a duly licensed adult cabaret until notified by the clerk that the license has been denied, but in no event may the clerk extend the application review time for than an additional 20 days.

4. An applicant for an adult entertainer's license shall be issued a temporary license upon receipt of a complete license application and fee. Said temporary license will automatically expire on the fourteenth day following the filing of the complete application and fee, unless the clerk has failed to approve or deny the license application in which case the temporary license shall be valid until the clerk approves or denies the application, or until the final determination of any appeal from a denial of the application. In no event may the clerk extend the application review time for more than an additional 20 days.

Section 4. Ordinance No. 346, Section 4, Ordinance No. 2070, Section 3, and Bellevue City Code Section 5.08.060 are hereby amended to read as follows:

5.08.060 Appeal.

A. Denial of License. Any person aggrieved by the action of the clerk in refusing to issue or renew any license issued under this chapter shall have the right to appeal such action to the Hearing Examiner, or to such other hearing body as may hereafter be established by the city council for the hearing of license appeals, by filing a notice of appeal with the clerk within ten days of notice of the refusal to issue or renew. The appeal shall be processed under Process VI, Bellevue City Code (Land Use Code) Section 20.35.600, *et seq.* The hearing Examiner or other hearing body shall set a date for hearing such appeal, to take place within 45 days of the date of receipt of the notice of appeal. At such hearing the appellant and other interested persons may appear and be heard, subject to rules and regulations of the Hearing Examiner or other hearing body. The Hearing Examiner or other hearing body shall render its decision on the appeal within 15 days following the close of the appeal hearing.

B. Appeal to Superior Court. Any person aggrieved by the decision of the Hearing Examiner or hearing body may appeal to the Superior Court for a writ of certiorari, prohibition or mandamus as provided in Bellevue City Code (Land Use Code) Section 20.35.635.

Section 5. Ordinance No. 4602 Section 6, Ordinance No. 4692, Section 6, Ordinance No. 4695, Section 1, are hereby amended to read as follows:

5.08.070 Standards of conduct and operation – Adult cabarets.

A. The following standards of conduct must be adhered to by employees of any adult cabaret while in any area in which members of the public are allowed to be present:

1. No employee or entertainer shall be unclothed or in such less than opaque and complete attire, costume or clothing so as to expose to view any portion of the female breast below the top of the areola or any portion of the pubic region, anus, buttocks, vulva or genitals, except upon a stage at least eighteen inches above the immediate floor level and removed at least eight feet from the nearest member of the public.

2. No employee or entertainer mingling with members of the public shall be unclothed or in less than opaque and complete attire, costume or clothing as described in subdivision 1 of this subsection, nor shall any male employee or entertainer at any time appear with his genitals in a discernibly turgid state, even if completely and opaquely covered, or wear or use any device or covering which simulates the same.

3. No employee or entertainer mingling with members of the public shall wear or use any device or covering exposed to view which simulates the breast below the top of the areola, vulva, genitals, anus, any portion of the pubic region, or buttocks.

4. No employee or entertainer shall caress, fondle or erotically touch any member of the public. No employee or entertainer shall encourage or permit any member of the public to caress, fondle or erotically touch any employee or entertainer.

5. No employee or entertainer shall perform actual or simulated acts of sexual conduct as defined in this chapter, or any act which constitutes a violation of RCW 7.48A, the Washington Moral Nuisances Statute, or Chapter 10A.88 of the Bellevue City Code.

6. No employee or entertainer mingling with members of the public shall conduct any dance, performance or exhibition in or about the non-stage area of the adult cabaret unless that dance, performance or exhibition is performed at a distance of no less than four feet from any member of the public.

7. No tip or gratuity offered to or accepted by an adult entertainer may be offered or accepted prior to any performance, dance or exhibition provided by the entertainer. No entertainer performing upon any stage area shall be permitted to accept any form of gratuity offered directly to the entertainer by any member of the public. Any gratuity offered to any entertainer performing upon any stage area must be placed into a receptacle provided for receipt of gratuities by the adult cabaret or provided through a manager on duty on the premises. Any gratuity or tip offered to any adult entertainer conducting any performance, dance or exhibition in or about the non-stage area of the adult cabaret shall be placed into the hand of the adult entertainer or into a receptacle provided by the adult entertainer, and not upon the person or into the clothing of the adult entertainer.

B. At any adult cabaret, the following are required:

1. Admission must be restricted to persons of the age of eighteen years or more. It is unlawful for any owner, operator, manager or other person in charge of an adult cabaret to knowingly permit or allow any person under the minimum age specified to be in or upon such premises.

2. Neither the performance nor any photograph, drawing, sketch or other pictorial or graphic representation thereof displaying any portion of the breasts below the top of the areola or any portion of the pubic hair, buttocks, genitals, and/or anus may be visible outside of the adult cabaret.

No member of the public shall be permitted at any time to enter into any of the non-public portions of the adult cabaret, which shall include but are not limited to: the dressing rooms of the entertainers or other rooms provided for the benefit of employees, and the kitchen and storage areas; EXCEPT that persons delivering goods and materials, food and beverages, or performing maintenance or repairs to the premises or equipment on the premises may be permitted into the non-public areas to the extent required to perform their job duties.

C. The responsibilities of the manager of an adult cabaret shall include but are not limited to:

1. A licensed manager shall be on duty at an adult cabaret at all times adult entertainment is being provided or members of the public are present on the premises. The name and license of the manager shall be prominently

posted during business hours. The manager shall be responsible for verifying that any person who provides adult entertainment within the premises possesses a current and valid entertainer's license.

2. The licensed manager on duty shall not be an entertainer.

3. The manager or an assistant manager licensed under this Chapter shall maintain visual observation of each member of the public at all times any entertainer is present in the public or performance areas of the adult cabaret. Where there is more than one performance area, or the performance areas is of such size or configuration that one manager or assistant manger is unable to visually observe, at all times, each adult entertainer, each employee, and each member of the public, a manager or assistant manager licensed under this Chapter shall be provided for each public or performance area or portion of a public or performance area visually separated from other portions of the adult cabaret.

4. The manager shall be responsible for and shall assure that the actions of members of the public, the adult entertainers and all other employees shall comply with all requirements of this chapter.

D. Premises – specifications

1. Performance area. The performance area of the adult cabaret where adult entertainment as described in Section 5.08.070.A.1 is provided shall be a stage or platform at least eighteen inches in elevation above the level

of the patron seating areas, and shall be separated by a distance of at least eight feet from all areas of the premises to which members of the public have access. A continuous railing at least three feet in height and located at least eight feet from all points of the performance area shall separate the performance area and the patron seating areas. The stage and the entire interior portion of cubicles, rooms or stalls wherein adult entertainment is provided must be visible from the common areas of the premises and at least one manager's station. Visibility shall not be blocked or obstructed by doors, curtains, drapes or any other obstruction whatsoever.

2. Lighting. Sufficient lighting shall be provided and equally distributed throughout the public areas of the premises so that all objects are plainly visible at all times. A minimum lighting level of 30 lux horizontal, measured at 30 inches from the floor and on 10 foot centers is hereby established for all areas of the adult cabaret where members of the public are admitted.

3. Signs. A sign at least two feet by two feet, with letters at least one inch height shall be conspicuously displayed in the public area(s) of the premises stating the following:

THIS ADULT CABARET IS REGULATED BY THE CITY OF BELLEVUE. ENTERTAINERS ARE:

A. NOT PERMITTED TO ENGAGE IN ANY TYPE OF SEXUAL CONDUCT

B. NOT PERMITTED TO APPEAR SEMI-NUDE OR NUDE, EXCEPT ON STAGE

C. NOT PERMITTED TO ACCEPT TIPS OR GRATUITIES IN ADVANCE OF THEIR PERFORMANCE

D. NOT PERMITTED TO ACCEPT TIPS DIRECTLY FROM PATRONS WHILE PERFORMING UPON ANY STAGE AREA

4. Record keeping requirements.

A. All papers, records, and things required to be kept pursuant to this chapter shall be open to inspection by the clerk during the hours when the licensed premises are open for business, upon two days' written notice. The purpose of such inspections shall be to determine whether the papers, records, and things meet the requirements of this ordinance.

B. Each adult entertainment business shall maintain and retain for a period of two years the name, address, and age of each person employed or otherwise retained or allowed to perform on the premises as an adult entertainer, including independent contractors and their employees, as an entertainer. This information shall be open to inspection by the clerk during hours of operation of the business upon twenty-four hours notice to the licensee.

5. Inspections.

In order to insure compliance with this chapter all areas of licensed adult cabarets which are open to members of the public shall be open to inspection by city agents and employees during the hours when the premises are open for business. The purpose of

such inspections shall be to determine if the licensed premises are operated in accordance with the requirements of this ordinance. It is hereby expressly declared that unannounced inspections are necessary to insure compliance with this ordinance.

E. It is unlawful for any adult cabaret to be operated or otherwise open to the public between the hours of two a.m. and ten a.m.

F. This chapter shall not be construed to prohibit:

1. Plays, operas, musicals, or other dramatic works that are not obscene;

2. Classes, seminars and lectures which are held for serious scientific or educational purposes and which are not obscene; or

3. Exhibitions, performances, expressions or dances that are not obscene.

These exemptions shall not apply to the sexual conduct described in RCW 7.48A.010(2)(b).

G. Whether or not activity is obscene shall be judged by consideration of the following factors:

1. Whether the average person, applying contemporary community standards, would find that the activity taken as a whole appeals to a prurient interest in sex; and

2. Whether the activity depicts or describes in a patently offensive way, as measured against community standards, sexual conduct as described in RCW 7.48A.010(2)(b); and

3. Whether the activity taken as a whole lacks serious literary, artistic, political or scientific value.

Section 6. Ordinance No. 346, Section 8, Ordinance No. 2070, Section 4, Ordinance No. 4602, Section 7, and Bellevue City Code Section 5.08.090 are hereby amended to read as follows:

5.08.090 License suspension and revocation – Hearing.

A. The clerk may, upon the recommendation of the chief of police or his designee and as provided in Subsection B below, suspend or revoke any license issued under the provisions of this chapter at any time where the same was procured by fraud or false representation of fact; or for the violation of, or failure to comply with the provisions of this chapter or any of the provisions of Chapter 10A.88 of this code or any other similar local or state law by the licensee or by any of his servants, agents or employees when the licensee knew or should have known of the violations committed by his servants, agents or employees; or for the conviction of the licensee of any crime or offense involving prostitution, promoting prostitution, or transactions involving controlled substances (as that term is defined in RCW Chapter 69.50) committed on the premises, or the conviction of any of his servants, agents or employees of any crime or offense involving prostitution, promoting prostitution, or transactions involving controlled substances (as that term is defined in RCW Chapter 69.50) committed on the premises in which his cabaret is conducted when the licensee knew or should have known of the violations committed by his servants, agents or employees.

B. A license procured by fraud or misrepresentation shall be revoked. Where other violations of this

chapter or other applicable ordinances, statutes or regulations are found, the license shall be suspended for a period of 30 days upon the first such violation, 90 days upon the second violation within a 24 month period, and revoked for third and subsequent violations within a 24 month period, not including periods of suspension.

C. The clerk shall provide at least ten days prior written notice to the licensee of the decision to suspend or revoke the license. Such notice shall inform the licensee of the right to appeal the decision to the Hearing Examiner or other designated hearing body and shall state the effective date of such revocation or suspension and the grounds for revocation or suspension. Such appeals shall be processed under Process VI, Bellevue City Code (Land Use Code) Section 20.35.600 *et seq*. The Hearing Examiner or other hearing body shall render its decision within 15 days following the close of the appeal hearing. Any person aggrieved by the decision of the Hearing Examiner of other designated hearing body shall have the right to appeal the decision to the Superior Court by writ of certiorari or mandamus as provided in Bellevue City Code (Land Use Code) Section 20.35.635. The decision of the clerk shall be stayed during the pendency of any appeal except as provided in Subsection D below.

D. Where the Bellevue Building Official or Fire Marshall or their designees or the King County Health Department find that any condition exists upon the premises of a cabaret or adult cabaret which constitutes a threat of immediate serious injury or damage to persons or property, said official may immediately suspend any license issued under this chapter pending a hearing in

accordance with Subsection C above. The official shall issue notice setting forth the basis for the action and the facts that constitute a threat of immediate serious injury or damage to persons or property, and informing the licensee of the right to appeal the suspension to the Hearing Examiner or other designated hearing body under the same appeal provisions set forth in Subsection C above, provided, however, that a suspension based on threat of immediate serious injury or damage shall not be stayed during the pendency of the appeal.

Section 7. This Ordinance shall take force and be in effect thirty days after its passage and legal publication.

PASSED by the City Council this 23rd day of January, 1995, and signed in authentication of its passage this 23rd day of January, 1995.

(SEAL)

/s/ Donald S. Davidson, DDS
Donald S. Davidson, DDS,
Mayor

Approved as to form:

Richard L. Andrews, City Attorney

/s/ Lori M. Riordan
Lori M. Riordan, Assistant City Attorney

Attest:

/s/ Myrna L. Basich
Myrna L. Basich, City Clerk

Published January 27, 1995

RULE 65. INJUNCTIONS

(a) Preliminary Injunction.

(1) *Notice.* No preliminary injunction shall be issued without notice to the adverse party.

(2) *Consolidation of Hearing With Trial on Merits.* Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. Even when this consolidation is not ordered, any evidence received upon an application for a preliminary injunction which would be admissible upon the trial on the merits becomes part of the record on the trial and need not be repeated upon the trial. This subsection shall be so construed and applied as to save to the parties any rights they may have to trial by jury.

(b) Temporary Restraining Order; Notice; Hearing; Duration. A temporary restraining order may be granted without written or oral notice to the adverse party or his attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or his attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting his claim that notice should not be required. Every temporary restraining order granted without notice shall be endorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state

why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed 14 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record. In case a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time and takes precedence over all matters except older matters of the same character; and when the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a preliminary injunction and, if he does not do so, the court shall dissolve the temporary restraining order. On 2 days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

(c) **Security.** Except as otherwise provided by statute, no restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. No such security shall be required of the United States or of an officer or agency thereof. Pursuant to RCW 4.92.080 no security shall be required of

the State of Washington, municipal corporations or political subdivisions of the State of Washington.

The provisions of rule 65.1 apply to a surety upon a bond or undertaking under this rule.

(d) Form and Scope. Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

(e) Statutes. These rules are intended to supplement and not to modify any statute prescribing the basis for obtaining injunctive relief. These rules shall prevail over statutes if there are procedural conflicts.

[Amended effective July 1, 1974; January 1, 1981; September 1, 1989.]

[SEAL] SUPERIOR COURT OF WASHINGTON
COUNTY OF KING

Ino Ino, Inc; Remus, et al.; Dejavu-Bellevue, Inc. Plaintiffs, vs. The City of Bellevue Defendant.	)	No. 95-2-02025-9 94-2-27797-9 94-2-22796-3 ORDER ON CIVIL MOTION

The above-entitled Court, having heard cross motions for temporary restraining order and orders to show cause

IT IS HEREBY ORDERED THAT the City of Bellevue and its agents are hereby temporarily restrained from enforcing the provisions of BCC 5.08.070(A)(5) and (6) pending a hearing on preliminary injunction set for March 13, 1995.

This order shall become effective on the posting by plaintiffs of a bond in the amount of $5,000.00.

DATED: Feb. 24, 1995.

/s/ Carol Schapira
JUDGE

Presented by:

/s/ Jack Burns #01590

Approved to form:

/s/ Lori M. Riordan #16386

IN THE SUPERIOR COURT OF WASHINGTON
IN AND FOR KING COUNTY

INO INO, INC., Plaintiff, v. CITY OF BELLELVUE, Defendant.	No. 95-2-02025-9
DEJA-VU BELLEVUE, INC., Plaintiff, v. CITY OF BELLEVUE, Defendant.	No. 94-2-22796-3
RONDA REMUS, ESMERALDA SILVA and VICTORIA McKNIGHT, Plaintiffs, v. CITY OF BELLEVUE, Defendant.	No. 94-2-27797-9 **REPLY TO MOTION FOR ATTORNEY FEES AND CROSS-MOTION FOR ATTORNEY FEES**

I.

RELIEF REQUESTED

Plaintiffs Ino Ino Inc., Remus, Silva and McKnight, respectfully request that this Court deny the defendant's motion for an award of attorneys, fees and costs it

allegedly incurred in dissolving the temporary restraining order (TRO). Washington case law regarding awarding attorneys' fees and costs in dissolving the TRO is preempted by the more stringent standards for awarding fees and costs to a *defendant* in a 42 U.S.C. § 1983 action. *See*, 42 U.S.C. § 1988. Furthermore, the defendants have failed to meet this more stringent test.

In addition, plaintiffs request that this Court award attorney's fees to the plaintiffs. Under § 1988, plaintiffs were the prevailing party because they prevailed on several significant issues and caused the defendants to amend a portion of the ordinance in question. Plaintiffs are also entitled to fees and costs as a sanction for the defendant's violation of Civil Rule 11; the defendants failed to address the preemption question and frivolously argued that plaintiffs' arguments had been decided in previous cases.

II.

STATEMENT OF FACTS

In October, 1994, the Plaintiffs Remus and Silva filed an action challenging the constitutionality of City of Bellevue ordinances 4692 and 4695, the predecessors to the current ordinance 4735. That action sought injunctive and declaratory relief. Ordinance 4735 was adopted by the Bellevue City Council in January, 1995. At the end of January, 1995, Ino Ino filed an action challenging the constitutionality of Ordinance 4735, seeking injunctive and declaratory relief and damages. Ino Ino, Remus and Silva filed a motion seeking a temporary restraining order. A separate action was filed by the Plaintiff Deja Vu

of Bellevue Inc and it too sought a temporary restraining order. The parties agreed to have the motion for a temporary restraining order heard in a single proceeding. A temporary restraining order was issued by this Court on February 24, 1995, on behalf of all Plaintiffs restrained the Defendant from enforcing Bellevue City Code § 5.08.070, subsection (A)(5), prohibiting simulated sex acts, and subsection (A)(6), the four foot set back requirement. Also, on that date, the Court permitted the filing of an amended complaint on behalf of the Plaintiffs Remus and Silva. The amended complaint contained a constitutional challenge to the adult cabaret licensing ordinance, as amended, and added an additional Plaintiff, Victoria McKnight. A hearing on the Plaintiffs' motion for a preliminary injunction was scheduled for March 13, 1995.

On March 12, 1995, the Bellevue City Council adopted Ordinance 4745. Ordinance 4745 attempted to cure the defect in subsection (A)(5) of BCC § 5.08.070, by providing that the prohibition contained in that subsection would not apply to simulated sexual conduct which is not obscene.

Prior to the hearing, the Plaintiff Deja Vu moved for consolidation of the hearing on the motion for preliminary injunction with trial on the merits. The other Plaintiffs joined in this motion. The Defendant initially opposed consolidation, but later withdrew its opposition. Trial began on March 13, 1995 and lasted until March 20, 1995. The trial court announced its oral decision and provided tentative findings to counsel on March 29, 1995. Thereafter, counsel for all of the Plaintiffs moved for reconsideration and filed their objections to the findings. The final judgments and findings, as amended, were

entered on April 24, 1995. Counsel for the parties have filed motions to vacate or amend the judgments and these motions are still pending.

In Conclusion of Law number 8, this Court construed subsection (A)(6) of BCC to require entertainers to perform at a distance of no less than four feet from "his or her customer". This construction was made to avoid constitutional infirmity in that the legislative history failed to disclose any historical evidence of unwanted or unexpected touching of dancers, and thus subsection (A)(6) requiring a four foot set back from "any member of the public", was overly broad. See Finding of Fact 12. In Conclusion of Law, this Court determined subsection (B)(2) of § 5.08.070 – dealing with outdoor signage – to be unconstitutional. In Conclusion of Law 33, this Court provided an additional judicial construction of the non-obscene works exception, BCC § 5.08.070(F), so as to avoid constitutional infirmity.

III.

STATEMENT OF ISSUES

A. Is Washington law regarding the awarding of attorneys' fees preempted by 42 U.S.C. § 1988?

B. Has the defendant met its burden under 42 U.S.C. § 1988 in proving plaintiffs' lawsuit pursuant to 42 U.S.C. § 1983 was frivolous, unreasonable or without foundation?

C. Are the plaintiffs entitled to fees and costs under 42 U.S.C. § 1988 where they substantially prevailed on a number of issues?

D. Are the plaintiffs entitled to fees and costs under CR 11 where the defendant's motion for attorney's fees was completely frivolous?

IV.

EVIDENCE RELIED UPON

The evidence consists of the Court's file, all documents, pleadings and exhibits contained therein, and the accompanying declaration of Gilbert H. Levy and attachments thereto.

V.

AUTHORITY AND ARGUMENT

A. Washington Case Law is Preempted by the More Stringent Test for Awarding Fees to a Defendant in a 42 U.S.C. § 1983 Action.

The City has argued that they are entitled to attorney's fees under the rule that such fees are recoverable as a cost of dissolving a wrongfully issued temporary injunction or restraining order, citing *Seattle Fire Fighters Union v. Hollister*, 48 Wn. App. 129, 138, 737 P.2d 1302 (1987). However, this lenient test for awarding attorney's fees has been preempted by the more stringent conditions imposed under 42 U.S.C. § 1988 in awarding attorney's fees to defendants in a 42 U.S.C. § 1983 action.

The doctrine of preemption is based upon the "supremacy clause" of the United States Constitution, art. 6. The burden is upon the party claiming preemption. *Physicians Ins. Exch. v. Fisons Corp.*, 122 Wn.2d 299, 327, 858 P.2d 1054 (1993). State law is preempted by federal

law occurs when there is an actual conflict between the two, manifested either: (1) when it is impossible to comply with both federal and state regulation; or (2) where the state law is an obstacle to the purposes and objectives of Congress. *Inlandboatmen v. Department of Transportation*, 119 Wn.2d 697, 702, 707, 836 P.2d 823 (1992). There may also be an implicit federal intent to supersede state law in a given area if: (1) a scheme of federal regulation is so pervasive that one could reasonably infer Congress left no room for supplemental regulation by the states; (2) if the federal act affects a field in which federal interest is so dominant; or (3) if the goals of the federal regulation reveal a purpose to preclude state authority. *Id.* at 701. In this case, Washington law is preempted under either possibility.

42 U.S.C § 1988 provides for attorneys fees as follows:

> In any action or proceeding to enforce a provision of sections . . . 1983 . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

While this section does not distinguish between prevailing plaintiffs and prevailing defendants, the Supreme Court has held that prevailing defendants are entitled to attorney's fees under this section only when the plaintiff's claim was "frivolous, unreasonable, or groundless," or when "the plaintiff continued to litigate after it clearly became so." *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 422, 98 S.Ct. 694, 54 L.Ed.2d 648 (1978); *Hutchison v. Staton*, 994 F.2d 1076, 1080 (4th Cir. 1993).

In *Maine v. Thiboutot*, 448 U.S. 1, 100 S.Ct. 2502 (1980), the Supreme Court held that the fee provision of 42 U.S.C. § 1988 is part of the remedies provided under § 1983 whether the action is brought in federal or state court. This is so because the fee provision is "an integral part" of the remedies necessary to obtain compliance with § 1983. *Thiboutot*. 448 U.S. at 10.

The Washington rule allowing attorneys' fees and costs whenever a TRO is dissolved is preempted by the Attorney's Fees Awards Act, 42 U.S.C. § 1988. In *East-Bibb Twiggs Neighborhood Association v. Macon-Bibb Planning & Zoning Commission* 674 F.Supp. 1475 (1987), *aff'd* 888 F.2d 1576 (11th Cir. 1989), the plaintiffs brought a claim based upon 42 U.S.C. § 1983. The defendant filed a counterclaim for abusive litigation because, under Georgia law, claims for abusive litigation must be brought as part of the litigation creating the claim. The district court dismissed the defendant's counterclaim because it was preempted by 42 U.S.C 1988. The court held that § 1988 governed the standard for awarding fees to a defendant and that:

> [b]y explicitly delineating what rights a defendant has when an abusive claim based upon federal law is brought against that party, Congress has simply pre-empted this entire area of the law . . .

The district court reasoned that if these types of counterclaims were to be allowed in federal causes of action, they would have a "tremendous chilling-effect" on the assertion of these federally created rights. Many causes of action could go unchallenged because of the fear of these sanctions. *Id.* at 1476-1477.

This reasoning is equally applicable to the present case. There is no question but that the Washington law allowing the award of attorney's fees to a defendant whenever a wrongfully issued TRO is dissolved is a much lower standard than the section 1988 requirement that the plaintiff's action be "frivolous, unreasonable or without foundation." Under *Inlandboatmen*, it would be impossible for this Court to comply with the lenient Washington law and the more stringent § 1988 requirement. Furthermore, the objectives and purposes of Congress in enacting § 1988 was to make sure competent counsel was available to civil rights plaintiffs. *Blanchard v. Bergeron*, 489 U.S. 96, 109 S.Ct. 939, 944, 103 L.Ed.2d 67 (1989). Washington law is an obstacle to this purpose because it punishes plaintiffs for bringing non-frivolous suits whenever they do not happen to prevail. This inhibits civil rights plaintiffs from obtaining any type of counsel, let alone competent counsel. As in *East-Bibb*, applying Washington law in this case would have a tremendous chilling effect upon the assertion of these very important federally created rights. Fear of sanctions could would mean that many federal constitutional violations would go unchallenged.

Furthermore, the scheme of the attorney's fees statute is so pervasive that Congress simply preempted this area of the law. *East-Bibb*. There is little likelihood that the states could supplement a statute that delineates a very specific test for awarding attorney's fees to a defendant. Certainly any supplemental help from the states could not be of the type that involves a *different legal test* as argued by the defendants. For these reasons, Washington law has been preempted by Federal law. Therefore, this

Court should analyze the City's claim for attorney's fees under the more stringent standard provided in 42 U.S.C. 1988.

B. The Defendant Has Failed to Show it is Entitled to Fees and Costs Under 42 U.S.C. § 1988.

The Attorney's Fees Awards Act, 42 U.S.C. § 1988, provides that attorney's fees are available to a "prevailing party" in a section 1983 action. Federal courts have held that a defendant must show the plaintiff's action was "frivolous, unreasonable or without foundation" in order to recover attorney's fees in a section 1983 action. *Macon-Bibb Planning & Zoning Commission,* 674 F.Supp. at 1476. The Supreme Court has emphasized that attorney's fees may be awarded to civil rights defendants only in exceptional circumstances. *Christiansburg Garment Co. v. EEOC,* 434 U.S. at 422; *Maag v. Wessler,* 993 F.2d 718, 721 (9th Cir. 1993)

The fact that a plaintiff may ultimately lose the case is not sufficient to impose attorney's fees:

> To take the further step of assessing attorney's fees against plaintiffs simply because they do not finally prevail would substantially add to the risks inhering in most litigation and would undercut the efforts of Congress to promote the vigorous enforcement of the provisions of Title VII. Hence, a plaintiff should not be assessed his opponent's attorney's fees unless a court finds that his claim was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so.

Christiansburg Garment Co. v. EEOC, 434 U.S. at 422, quoted in *Hughes v. Rowe*, 449 U.S. 5, 14-15, 101 S.Ct. 173, 178, 66 L.Ed.2d 163 (1980)(applying *Christiansburg* to 42 U.S.C. 1983 cases). Under this more stringent test, the City has failed to show that the action was "frivolous, unreasonable or without foundation."

The City has argued that the issues raised by the Plaintiffs have been definitively resolved by previous decisions. This argument is totally devoid of merit. The only decision directly dealing with the constitutionality of a ten foot set back applicable to all types of dancing is *KEV Inc. v. Kitsap County*, 793 F. 2d 1053 (9th Cir. 1986). As previously argued, the Plaintiffs in that case made no showing as to the actual impact of the set back, and the decision was based upon federal rather than state constitutional law, which is at least arguably more protective of free speech rights. Furthermore, the *KEV* decision, however persuasive, is not directly binding on the Washington Courts. *O'Day v. King County*, 109 Wn. 2d 796, 749 P. 2d 142 (1988), did not impose a stage requirement on all dances, but only dances wherein certain body parts are displayed. *Bolser v. Liquor Board*, 90 Wn. 2d 223, 580 P. 2d 629 (1978), rested primarily on the state's broad regulatory powers with respect to alcoholic beverages, and only imposed the set backs at establishments licensed to sell alcoholic beverages. On the other hand, the Plaintiffs herein had cause to believe that this Court would follow the example of Judge Agid in *Davis et al. v. Snohomish County*, King County Cause No. 87-2-01335-9, and would sustain a challenge to the four foot set back on overbreadth grounds, in that not all forms of dance have adverse secondary effects, even if performed within four

feet of a customer. For these reasons, the City's suggestion that the Plaintiffs arguments were frivolous and unreasonable are themselves frivolous and unreasonable, and provide an appropriate basis for Rule 11 sanctions, as argued herein.

The City also argues that the plaintiffs' argument regarding the illumination requirements and licensing requirements were previously decided in *World Wide Video v. Tukwila*, 117 Wn.2d 382, 816 P.2d 18 (1991). However, the information that was required to be disclosed by the Tukwila ordinance does not even to begin to approach the disclosures that are required by the Bellevue Ordinance. *See*, 117 Wn.2d at 391-392. Tukwila, for example, does not require the disclosure of prior criminal convictions or prior license history. Second, the Court in WWV held that the requirement of "equal" lighting was constitutional. This is quite a different issue than the 30 lux requirement contained in the Bellevue Ordinance.

C. Plaintiffs are Entitled to Attorneys' Fees and Costs because they Prevailed on a Significant Issue and the Lawsuit was a Catalyst for Many Significant Changes.

1. The Plaintiffs Prevailed on Significant Issues.

Under 42 U.S.C. § 1988, a plaintiff is entitled to attorney's fees and costs when the plaintiff is the prevailing party. A plaintiff is the prevailing party if he or she succeeds on any significant issue in litigation which achieves some of the benefits the plaintiff sought in the lawsuit. In other words, the plaintiff only must show that the legal relationship between it and the defendant has

been changed. A plaintiff does not have to be successful on all of its claims in order to be entitled to attorney's fees. *Estate of Borst v. O'Brien*, 979 F.2d 511, 515, (7th Cir. 1992). In this case, the plaintiffs prevailed on a number of significant issues under the law. First, in Conclusion of Law No. 32, this Court found BCC 5.08.070(B)(2), which prohibited the use of nude persons or images of nude persons outside adult cabarets, unconstitutional because it is not limited to that which is obscene or harmful to minors. FF&CL 32. Second, in Conclusion of Law No. 8, this Court limited BCC 5.08.070(A)(6) to require the dancer maintain a distance of four feet from the customer, as opposed to a broader interpretation requiring a four foot distance even from persons unconnected to the dance. FF&CL 8.

In *Church of Scientology v. City of Clearwater*, 2 F.3d 1509 (11th Cir. 1993), the plaintiff filed an action under 42 U.S.C. 1983 to enjoin the enforcement of certain ordinances. In response to a challenge based upon vagueness, some of the provisions were clarified in the plaintiff's favor, while other provisions were repealed. The Eleventh Circuit Court of Appeals held that the plaintiff was entitled to attorney's fees under these circumstances. *Id.* at 1513. Similarly, in this case, the plaintiffs are entitle [sic] to attorney's fees because this Court clarified the four feet distance requirement and the ban on simulated sexual activities in a manner favorable to the plaintiffs.

The plaintiff's were the prevailing party in this lawsuit because they prevailed on several significant issues. First, this Court found the prohibition on the use of certain images unconstitutional. Second, this Court limited the ordinance establishing a distance of four feet to

the customer of the dance. Finally, this Court construed the ordinance so as to exempt from prosecution stage dance performances involving simulated sexual conduct which is not obscene. This Court should award attorney's fees to the plaintiffs.

2. Plaintiffs' Action Was a Catalyst for Changes in the Ordinances.

Furthermore, a plaintiff may prevail even where there has been no judicial determination on the merits. In the absence of such a determination, the court must apply the "catalyst" test to determine if the plaintiff is the prevailing party. Under the catalyst test, the plaintiff must show the following facts: (1) that the lawsuit has a causal link to securing the relief obtained; and (2) that the defendant's conduct in response to the plaintiff's lawsuit was required by law. The lawsuit must have been a "substantial factor" or "significant catalyst" and the plaintiff must also show that he would have prevailed on the merits. *Foremaster v. City of St. George*, 882 F.2d 1485, 1488 (10th Cir. 1989).

In response to the cause of action filed by the plaintiffs, the city changed a number of the ordinances under question. For example, after the Remus lawsuit was filed, the Bellevue City Council adopted Ordinance 4735, which contained a somewhat narrower definition of the phrase "adult entertainment". In March 1995, the Bellevue City Council adopted Ordinance 4745, which was an effort to deal with the under inclusiveness of the obscene works exception, which previously provided grounds for issuance of a temporary restraining order. These legislative

changes for which the Plaintiffs' actions were a catalyst provide additional grounds for an award of attorney's fees.

D. This Court Should Impose Attorneys' Fees and Costs Upon the Defendant's Because they Violated Rule 11.

Civil Rule (CR) 11 requires attorneys to date and sign all pleadings, motions and legal memoranda. This signature is a certification that the papers signed are well grounded in fact and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law. If CR 11 has been violated, the court shall impose sanctions, which may include reasonable attorney's fees and expenses. *Biggs v. Vail*, 124 Wn.2d 193, 197, ___ P.2d ___ (1994). In determining whether a pleading satisfies the requirements of CR 11, a court must determine if it is factually or legally frivolous. A complaint is legally frivolous where it is not based upon a plausible view of the law.

Here, the City's motion for attorneys fees is clearly frivolous. The first section of the City's motion is frivolous because Washington law regarding attorney's fees is so clearly preempted under federal law. Second, the City's motion for fees under 42 U.S.C. § 1988 is clearly frivolous because the plaintiffs' motion, while unsuccessful in this court, was not frivolous. The Defendant is unable to advance even a good faith argument as to why its fee request meets the heavy burden required by § 1988, and this entire proceeding is an unnecessary, transparent effort to harass the Plaintiffs and to waste the Court's time.

VI.

CONCLUSION

The Court should deny the fee and cost request of the Defendant and award attorney fees and costs to the Plaintiff.

DATED this 17 day of May, 1995.

/s/ Gilbert H. Levy
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WSBA No. 4805
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Ino Ino, Remus, Silva
and McKnight

THE SUPREME COURT OF WASHINGTON

INO INO, INC., Respondent,

v.

THE CITY OF BELLEVUE, Appellant,

DEJA VU-BELLEVUE, Respondent,

v.

THE CITY OF BELLEVUE, Appellant.

RONDA REMUS, et al., Respondents,

v.

THE CITY OF BELLEVUE, Appellant.

Nos. 62941-2; 62939-1 62940-4

ORDER CHANGING OPINION

(Filed Aug. 21, 1997)

It is hereby ordered that the opinion in the above cause, as the same appears at 132 Wn.2d 103, be changed as follows:

1. In the third and fourth lines from the top of page 145, the following words are deleted: "except as to BCC § 5.08.070(B)(2) relating to outdoor displays".

2. In the ninth through the twelfth lines from the top of page 145, the following words are deleted: "with the exception that if fees can be segregated, the city may recover fees expended in dissolving the injunction relating to outdoor displays".

Dated this 21st day of August, 1997.

/s/ Durham, C.J.
Chief Justice

APPROVED:

/s/ Barbara Macsen

132 Wn.2d 103

Supreme Court, U.S.
FILED
DEC 19 1997
CLERK

(2)

No. 97-858

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1997

INO INO, INC., RHONDA REMUS, ESMERALDA SILVA, VICTORIA MCKNIGHT, and DEJA VU-BELLEVUE, INC.,
Petitioners,
v.

CITY OF BELLEVUE, WASHINGTON,
Respondent.

Petition For Writ Of Certiorari To The Washington Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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51 pp

QUESTIONS PRESENTED

If a plaintiff obtains a temporary restraining order enjoining a valid city ordinance by misstating a state constitutional claim, is the trial court precluded by 42 U.S.C. § 1988 from applying state law and awarding the city its reasonable attorneys' fees incurred in lifting the injunction?

Did the Washington Supreme Court err in refusing to award attorneys' fees to plaintiffs under 42 U.S.C. § 1988, when they succeeded on only one of several claims asserted under the Washington State Constitution, and the court explicitly rejected all claims asserted under federal law?

PARTIES TO THE PROCEEDING

Respondent in this Court is the City of Bellevue, Washington, the defendant in three cases that were consolidated in Washington state court proceedings.

Petitioners in this Court are the plaintiffs in those proceedings. Ino Ino, Inc. was the owner and operator of an erotic nightclub, "Papagayo's," located in Bellevue. Petitioners Remus, Silva and McKnight were entertainers at "Papagayo's." Petitioner Deja Vu-Bellevue, Inc. planned to open another erotic nightclub in Bellevue.

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OPINION BELOW

The decision of the Washington Supreme Court is reported as *Ino Ino, Inc. v. City of Bellevue*, 132 Wn.2d 103, 937 P.2d 154, *amended*, 943 P.2d 1358 (1997).

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, First Amendment.

Washington Constitution, Article I, Section 5.

42 U.S.C. Sections 1983 and 1988.

STATEMENT OF THE CASE

Petitioners filed three separate actions challenging the validity of an adult entertainment ordinance enacted by the City of Bellevue (the "City"). Their complaints alleged that the ordinance violated the Washington State and United States Constitutions.[1] Petitioners sought and obtained a temporary restraining order enjoining the City from enforcing a provision of its ordinance that established a four-foot

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[1] *See* Appendix for Petition for Certiorari (hereinafter "Pet. App.") 113, 120 and 127.

minimum distance between performer and patron for off-stage "table dances."[2] Pet. App. 164.

Petitioners challenged the distance restriction principally on the basis that it violated their rights under Article I, Section 5 of the Washington Constitution. Appendix, pp. 23-36.[3] Petitioners argued that the state constitution provides broader protection than the First Amendment. *Id.* at 23, 26, 27, and 29. Petitioner Ino Ino attempted to distinguish cases that had upheld even greater distance limitations by arguing that they had been decided under the *federal* constitution. *Id.* at 29-30.

After obtaining the temporary restraining order, petitioners moved successfully to consolidate the preliminary injunction hearing with a trial on the merits. Pet. App. 83.

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[2] A "table dance" is an individually compensated performance during which the performer dances in close proximity to the patron. The performance frequently involves the exposure of breasts and/or genitalia and unlawful sexual conduct. Pet. App. 4-7.

The temporary restraining order also enjoined a portion of the ordinance prohibiting actual or simulated acts of sexual conduct. Pet. App. 164.

[3] Petitioner Ino Ino's Motion for Temporary Restraining Order is attached in the Appendix hereto.

The trial court heard substantial evidence relating to the City's four-foot distance restriction upon "table dances" and the efficacy of the four-foot setback in preventing sexual conduct during those performances. Evidence at trial showed that table dances typically involve contact and unlawful sexual conduct between performers and patrons. Pet. App. 76-87.

After a six-day trial, the court rejected petitioners' arguments and vacated the restraining order. The court determined that the distance restriction was a permissible regulation of conduct under state law. Pet. App. 86 (¶ 9). The trial court also determined that there was "no need" to engage in an analysis of the distance regulation as a time, place or manner restriction under federal law. Pet. App. 86 (¶¶ 9-10). If such an analysis were undertaken, however, the court ruled that the City's ordinance would satisfy it.[4] Pet. App. 86 (¶ 10).

The City moved for and obtained a post-trial award of attorneys' fees under state law for its expenses in vacating a wrongful injunction. Pet. App. 95. The Washington

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[4] The trial court also found that the ordinance's prohibition on actual or simulated sexual conduct was valid under state law. Pet. App. 88 (¶ 15).

Supreme Court affirmed the propriety of this award, but it remanded the case to the trial court for recalculation of the City's fees. Pet. App. 44-46. Rather than contest the amount of fees owing, petitioners conceded that the City was entitled to the amount it claimed.[5] Pet. App. 104-106.

The Washington Supreme Court's analysis of the four-foot rule focused largely on petitioners' state constitutional arguments. *Compare* Pet. App. 8-18 and 21-24 (analyzing Article 1, Section 5 in the context of erotic expression) *with* Pet. App. 25-30 (analyzing four-foot restriction under the First Amendment). The Washington Supreme Court ultimately concluded that the Washington State Constitution does not require a departure from well-settled federal standards for analyzing distance restrictions on erotic speech. *See Kev, Inc. v. Kitsap Co.*, 793 F.2d 1053 (9th Cir. 1986); *BSA, Inc. v. King Co.*, 804 F.2d 1104 (9th Cir. 1986).

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[5] The amount sought by the City ($36,172.53) represented the fees expended to vacate the temporary restraining order in the trial court. The Washington Supreme Court declined to award attorneys' fees on appeal, and City neither sought nor obtained an award of the fees incurred in the trial court on other issues. *See* Pet. App. 44-48, 104-05. The total amount of attorneys' fees and costs incurred by the City in this matter exceeds $200,000.00.

The Washington Supreme Court denied petitioners' claim for attorneys' fees under 42 U.S.C. § 1988. The court noted that petitioners did not succeed on any federal claim. Pet. App. 48-49 and n. 18.

ARGUMENT AND AUTHORITIES

A. No Federal Issue is Raised By the Award of Attorneys' Fees to the City. The Award Was Made Under State Law After Petitioners Asserted and Failed to Prove State Claims.

Petitioners sought equitable relief in state court principally under the Washington Constitution, because case law denied them any right to relief under federal law. Petitioner Ino Ino's motion for a temporary restraining order demonstrates both points. First, Ino Ino asserted its claims against the City's four-foot distance requirement primarily under the Washington Constitution. Appendix 23 *et seq.* Second, Ino Ino distinguished applicable federal case law on the ground that those cases were decided under the "First Amendment rather than the broader protection of Article 1 Section 5 of the Washington Constitution." Appendix 29.

Petitioners' preemption arguments all share a fundamental flaw: they ignore that state and not federal rights

were really at issue. Because petitioners did not obtain the temporary restraining order under federal law, the fees provision in 42 U.S.C. § 1988 was never triggered.[6] Accordingly, the preemption cases they cite are not germane.

In any event, petitioners overstate their preemption argument. No case has held that a state-court equitable rule may not be enforced in an action brought under state law simply because plaintiffs also alleged federal rights.

Petitioners rely on *Varney v. O'Brien*, 147 Mich. App. 397, 383 N.W.2d 213, 217 (1985), for the proposition that section 1988 preempts a state procedural rule requiring an attempt to mediate before attorneys' fees may be awarded. Petitioners fail to disclose that *Varney* was vacated and effectively overruled, based on this Court's decision in *Marek v. Chesny*, 473 U.S. 1, 105 S.Ct. 3012, 87 L.Ed.2d 1 (1985).

In *Marek*, this Court held that a fee award under section 1988 must be considered in light of an applicable

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[6] Just as petitioners sought injunctive relief primarily under the state constitution and attempted to distinguish authorities applying a federal constitutional standard, so the Washington Supreme Court discussed the state standard extensively before rejecting its application to the four-foot rule. Pet. App. 8-18 and 21-24.

procedural rule that might limit or preclude such fees. Rule 68 of the Federal Rules of Civil Procedure was enacted to encourage settlement and avoid litigation. *Id.* at 5. This Court found nothing incompatible in a statute awarding fees for meritorious lawsuits and a court rule encouraging the settlement of litigation.[7] *Id.* at 11. In short, the statute did not preempt the procedural rule.

After *Marek* was decided, the Michigan Supreme Court remanded the appeal in *Varney* with instructions to reconsider it in light of *Marek*. *Varney v. Genesee County Sheriff*, 426 Mich. 855, 393 N.W.2d 1 (1986). On remand the Michigan Court of Appeals held that both section 1988 and the state procedural rule must be applied by the trial court in determining what fees, if any, may be awarded. *Varney*, 402 N.W.2d at 60.

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[7] Similarly, despite the fact that 42 U.S.C. § 20004-5(k) forbids the award of fees to the federal government as a prevailing defendant in a civil rights action, many courts have held that the assessment of legal fees against a civil rights plaintiff may be imposed on a variety of legal grounds. *E.g.*, *Blue v. U.S. Dept. of Army*, 914 F.2d 525, 535-36 (4th Cir. 1990) (awarding fees to United States under common-law bad faith exception to American rule and FED.R.CIV.P. 11), and cases cited therein.

The only other case cited by petitioners as applying preemption analysis to section 1988 rights was also eroded by a subsequent decision. Although the district court found preemption under section 1988 in *East-Bibb Twiggs Neighborhood Ass'n v. Macon-Bibb Planning and Zoning Com'n*, 674 F. Supp. 1475, 1477 (M.D. Ga. 1987), the court of appeals affirmed on other grounds, without analyzing the preemption issue. 888 F.2d 1576, *as amended*, 896 F.2d 1264 (11th Cir. 1989).[8]

Petitioners sought equitable relief in state court upon state constitutional grounds. Appendix 23 *et seq*. The equitable relief they obtained was "wrongful" under Washington law. Pet. App. 44-45. Petitioners were subject to a long-standing state court rule that required them to pay for the costs of vacating a wrongful injunction. Like the court rules in *Marek* and *Varney*, the rule in this case is designed to encourage an economical resolution on the

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[8] The district court decision in *East-Bibb* has been criticized. In *Del Rio v. Jetton*, 55 Cal. App.4th 30, 63 Cal. Rptr.2d 712, 716-17 (Cal. App. 2 Dist. 1997), the court held that a state common-law claim for malicious prosecution, seeking damages which included attorneys' fees in defense of a prior 42 U.S.C. § 1983 civil rights action, was not preempted by 42 U.S.C. § 1988.

merits. *White v. Wilhelm*, 34 Wn. App. 763, 773-74, 665 P.2d 407, *rev. denied*, 100 Wn.2d 1025 (1983).

Even if there were a basis to construe section 1988 as antithetical to a state rule such as that applied here, this is not the case to consider that issue. At a minimum, there is very serious doubt that federal law had anything to do with the trial court's decision to grant and then vacate equitable relief.

B. Because the Washington Supreme Court Rejected Petitioners' Federal Law Claims, They Have No Basis for Claiming Attorneys' Fees under 42 U.S.C. § 1988.

Petitioners appear to argue that the mere presence of a federal law claim requires the award of attorneys' fees under 42 U.S.C. § 1988 if a plaintiff prevails on a pendant state claim. Petitioners misread *Maher v. Gagne*, 448 U.S. 136, 100 S.Ct. 2579, 65 L.Ed.2d 653 (1980), and its progeny for this proposition.

Petitioners contended under state and federal constitutional law that the City's 14-day delay in issuing managers' licenses was a prior restraint. The Washington Supreme Court *rejected* petitioners' claim under *federal* constitutional law, citing *World Wide Video, Inc. v. City of Tukwila*, 117 Wn.2d 382, 392-94, 816 P.2d 18 (1991), *cert.*

denied, 503 U.S. 986 (1992) (holding that 30-delay in issuance of operator's license does not violate federal constitution). Pet. App. 49 n. 18. The court found that the delay violated the broader prohibition on prior restraint that exists *only under the Washington State Constitution. Id.*; *see also* Pet. App. 19-21.[9]

The text of 42 U.S.C. § 1988 limits the recovery of attorneys' fees to the enforcement of a *federal* right. A limited exception was recognized in *Maher v. Gagne*: fees may be recovered when a court refrains from deciding the federal issue but makes a determination for plaintiffs on a pendant state claim arising from the same facts. *Id.*, 448 U.S. at 132 n. 15 (pendant state law claim justified section 1988 award when court "declines" to decide federal issue). Petitioners cite no case holding that a section 1988 award is proper when all federal claims are *denied*. The rationale for the *Maher* rule--the avoidance of an unnecessary federal constitutional decision--disappears when the plaintiff's federal law claims are rejected, as in this case.

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[9] Of the combined 22 separate constitutional claims raised by petitioners in the trial court, this was the only claim on which they ultimately prevailed. *See* Pet. App. 49, 83-94.

None of the cases cited by petitioners support the award of section 1988 fees when all federal claims are expressly rejected. *Cf. Exeter-West Greenwich Regional School District v. Pontarelli*, 788 F.2d 47, 51 (1st Cir. 1986) (court abstained from deciding federal claims); *Seals v. Quarterly County Court of Madison Co.*, 562 F.2d 390, 392 (6th Cir. 1977) (decision on federal claim unnecessary); *Robert M. v. Benton*, 671 F.2d 1104, 1106 (same); *Southeast Legal Defense Group v. Adams*, 657 F.2d 1118, 1124 (9th Cir. 1981) (same).

Courts that *have* considered and *rejected* federal claims routinely refuse to award section 1988 attorneys' fees, even though plaintiffs have prevailed on a state law claim. *See e.g., Kelly v. City of Leesville*, 897 F.2d 172, 177 (5th Cir. 1990); *Snohomish County v. Anderson*, 124 Wn.2d 834, 843-44, 881 P.2d 240 (1994); *see also Southeast Legal Defense*, *supra*, 657 F.2d at 1124 (award of fees on pendant claim assumes a meritorious but undecided federal claim).

Under petitioners' reading of *Maher v. Gagne*, success on any state law claim would trigger an award of section 1988 relief if a federal claim is merely alleged. No

court has applied *Maher* in this fashion. Unless a court rules in favor of the plaintiff on a federal-law claim or declines to decide a federal claim because it has resolved the case on non-federal grounds, no section 1988 award is proper. In this case, the Washington Supreme Court considered and rejected all federal claims asserted by petitioners. It would have been improper to award fees under section 1988 in such circumstances. The court did not err, and there is no basis for this Court to grant further review.

CONCLUSION

Petitioners raise no issue justifying the grant of certiorari. The award of partial attorneys' fees for the wrongful obtaining of preliminary injunctive relief by petitioners under state law in a state court served state policies protecting judicial resources and promoting the enforcement of valid laws. No federal right is implicated.

Petitioners did not prevail on any claim under the federal constitution or federal laws. They have no right to attorneys' fees under 42 U.S.C. § 1988.

DATED this 15th day of December, 1997.

Respectfully submitted,

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Motion for Temporary Restraining Order and Order to Show Cause in *Ino Ino, Inc. v. City of Bellevue*, King County Superior Court No. 95-2-02025-9 ..... App. 1

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

Ino Ino, Inc., a Washington corporation,	)
	) No. 95-2-02025-9
Plaintiff,	) MOTION FOR TEMPORARY
	) RESTRAINING ORDER AND
v.	) ORDER TO SHOW CAUSE
City of Bellevue, a municipal corporation,	)
Defendant.	)

I.

RELIEF REQUESTED

The Plaintiff requests issuance of a temporary restraining order and order to show cause preventing the Defendant, its agents and employees, from enforcing Bellevue Ordinances 4692, 4695 and 4735 against the Plaintiff pending a hearing on the motion for a preliminary injunction. The Plaintiff also requests an order requiring the Defendant to appear and show cause as to why a preliminary injunction should not be issued, restraining the enforcement of City of Bellevue Ordinances 4692, 4695 and 4735 against the Plaintiff.

II.
STATEMENT OF FACTS

The Plaintiff, Ino Ino Inc., is a Washington corporation in good standing. The Plaintiff does business as Papagayo's, a restaurant and nightclub located at 2239 148th Avenue NE, Bellevue, Washington. In October 1994, the Plaintiff was issued an adult cabaret license although it did not at the time present adult entertainment. Recently, the Plaintiff has begun providing adult entertainment. The entertainment consists of nude dancing on stage and table dancing by female entertainers. The entertainers are not employees of the business, but independent contractors. The entertainers are compensated directly by customers for the table dances that they perform. Each table dance is an individualized performance which traditionally is performed in close physical proximity to the customer in order to create a sense of intimacy and rapport. Entertainers pay a portion of their earnings to the business as rent. The business does not serve alcoholic beverages.

On September 6, 1994, the Bellevue City Council enacted Ordinance 4692, which amended and supplemented the existing provisions of the Adult Cabaret Licensing Ordinance, BCC § 5.08.010 et seq. As amended by Ordinance 4692, Bellevue City Code, (hereinafter BCC), § 5.08.010A defines as an "adult cabaret" as:

> . . . any premises, including any cabaret premises, to which any member of the public is invited or admitted and where an entertainer provides adult entertainment to any member of the public.

As amended by Ordinance 4692, BCC § 5.08.010B defines "adult entertainment" as:

1. Any exhibition, performance or dance of any type conducted in a premises where such exhibition, performance or dance involves a person who is unclothed or in such costume, attire or clothing as to expose any portion of the female breast below the top of the areola or any portion of the pubic region, anus, buttocks, vulva or genitals or wearing any device or covering exposed to view which simulates the appearance of any portion of the female breast below the top of the areola or any portion of the public region, anus, buttocks, vulva or genitals, or human male genitals in a discernibly turgid state, even if completely and opaquely covered; or

2. Any exhibition, performance or dance conducted in a premises where such exhibition, performance or dance is performed within the view of one or more members of the public and is intended or is likely to sexually stimulate any member of the public.

On September 19, 1994, the Bellevue City Council enacted Ordinance 4695, which further amended and revised the provisions of the adult cabaret licensing ordinance. As revised in 4695, § 5.08.070 contains various standards governing the conduct of the business, entertainers, and managers. Subsection A(6) of 5.08.070 provides:

No employee or entertainer mingling with members of the public shall conduct any dance, performance or exhibition in or about the non-stage area of the adult cabaret unless that dance, performance or exhibition is performed at a distance of no less than four feet from any member of the public.

Subsection D(2) of § 5.08.070 provides:

> Sufficient lighting shall be provided and equally distributed throughout the public areas of the premises so that all objects are plainly visible at all times. A minimum lighting level of 30 lux semi-cylindrical measured at 30 inches from the floor on 10 foot centers is hereby established for all areas of the adult cabaret where members of the public are admitted.

On January 23, 1995, the Bellevue City Council enacted Ordinance 4735, which is not scheduled to go into effect until February 23, 1995. Ordinance 4735 contains a new definition of "adult entertainment". The definition of "adult entertainment" is not a material issue in dispute because the Plaintiff agrees that it will provide "adult entertainment" under either the old or new definitions in the ordinance.

The Plaintiff maintains that subsection A(6) § 5.08.070 which requires all dances to be performed, "at a distance of no less than four feet from any member of the public" constitutes an unreasonable restrain on the exercise of fee speech rights. This provision of the ordinance was ostensibly adopted by the Bellevue City Council as a means to prevent entertainers and customers from engaging in illegal conduct. However, it goes far beyond what is necessary to achieve that purpose. Table dances are performed as dances for individual customers. Entertainers use space and close physical proximity to the customer to establish a sense of intimacy and rapport. Requiring a dance to dance four feet away substantially detracts from the aesthetic quality of the performance, and does not serve any legitimate governmental purpose. In addition, the requirement that the dancer remain four feet away from "any member of the public" is vague, impossible to comply with, and significantly reduces the

number of entertainers and customers that the business can accommodate at one time. When this ordinance was being considered by the Bellevue City Council, Dick Andrew, the Bellevue City Attorney, testified that the goal of maintaining of physical space between customers and entertainers could be effectively attained with a one foot setback requirement.

The "30 lux" illumination standard contained in subsection D(2) of 5.08.070 requires a much higher level of illumination than is necessary for persons and objects in the premises to be plainly visible to inspecting officers. The level or illumination required by the "30 lux" standard is glaring, uncomfortable and makes it impossible for the business to accentuate or spotlight the performance on the stage.

The Plaintiff maintains that the four foot clear distance requirement and the 30 lux illumination standard were not adopted by the Bellevue City Council to eradicate so called secondary effects alleged to be associated with adult entertainment. Instead, the Council members knew at the time that the ordinance was adopted that these unnecessary restrictions would tend to make it unprofitable for the Plaintiff to be able to operate its business. The following is a summary of the evidence relevant to this claim:

The original City of Bellevue Adult Cabaret licensing ordinance, Ordinance 4602, was adopted by the Bellevue City Council in November 1993. That Ordinance, which is fairly typical of adult entertainment licensing ordinances, permitted table dancing but prohibited nude dancing from taking place except upon a stage, six feet from the nearest customer and eighteen inches off the ground. At the time that 4602 was adopted, there were no nude dancing establishments operating in the City of Bellevue.

Sometime during the summer of 1994, the company which operates the Deja Vu nightclub chain applied for a building permit to construct an adult nightclub in the City of Bellevue, In July 1994, Andrea Vangor, the Executive Director of an organization known as Washington Together Against Pornography wrote a letter to Bellevue City Council member Margot Blacker. The letter recommended that the City of Bellevue adopt legislation imposing minimum distance requirements. Washington Together Against Pornography is an organization which advocates imposition of the strictest possible regulations against sexually oriented business and is, in fact, a pro-censorship organization. In October 1993, Washington Together Against Pornography hosted a seminar at the Bellevue Conference Center which was presented by attorneys with the National Family Legal Foundation, another pro-censorship organization. Bellevue City Council Member Margot Blacker is on the Advisory Board of Washington Together Against Pornography. Throughout the various public hearings dealing with licensing regulations applicable to adult nightclubs, Ms. Blacker never disclosed her connection with Washington Together Against Pornography, nor did she mention the fact that there had been ex parte communications between herself and Ms. Vangor.

Ms. Vangor wrote a letter to Mayor Davidson and all the City Council members on September 6, 1992, the day that the Bellevue City Council adopted Ordinance 4692. In this letter, Ms. Vangor made references to conversations that she had with Council Member Blacker, Mayor Davidson and Assistant City Attorney Lori Riordan with respect to the pending legislation. Again, none of these ex parte contacts were publicly disclosed. in the letter Ms. Vangor specifically took issue with the recommendation by City Attorney Dick Andrew that there be a one foot distance between

entertainers and customers and she recommended instead a four foot setback requirement.

Bob Wyrich, a representative of Washington Together Against Pornography, spoke to the Council at the public hearing on September 6, 1994, which preceded adoption of Ordinance 4692. According to the official minutes of that Council Session:

> . . . Mr. Wyrich urged the Council to retain the four-foot rule regarding table dancing and indicated that adult entertainment establishments will go out of business if the existing regulations are strictly enforced.

(Emphasis supplied).

Following the presentation of Mr. Wyrich, the Council rejected the one foot setback suggested by Mr. Andrew, and opted for the four foot setback that was being proposed by Washington Together Against Pornography. The four foot setback requirement was specifically proposed by Council Member Margot Blacker. According to the official minutes:

> Thanking the Legal Department, the citizens and Wash TAP for their work on this issue, Mrs. Blacker offered an amendment to Ordinance 4692 to change table dancing minimum distance from one foot to four feet. Mrs. Zumdieck seconded the amendment.

Most of the legislative business of the Bellevue City Council is conducted in what are referred to as "study sessions" at which no members of the public are permitted to address the Council. Public discussion of pending legislation is limited to five minutes at the public hearing which

immediately precedes enactment. Although there were extensive contacts between council members and Washington Together Against Pornography prior to the adoption of Ordinances 4692, 4695 and 4735, no representatives of the adult industry were ever invited by the Council to comment on the pending legislation nor were they even advised that the legislation was pending.

III.
STATEMENT OF ISSUES

The issue presented by this motion is whether or not the Plaintiff is entitled to issuance of a temporary restraining order and order to show cause.

IV.
EVIDENCE RELIED UPON

The evidence relied upon consists of the following:
Declaration of David Brown
Declaration of Kris Wheeler
Declaration of David Ebert.
Declaration of Gilbert H. Levy and attachments thereto.

V.
AUTHORITY AND ARGUMENT

A. The Plaintiff is entitled to the issuance of a temporary restraining order.

In order to obtain a temporary or permanent injunction, a party must show: (1) That he has a clear, legal or equitable right; (2) That he has a well-grounded fear of immediate invasion of that right; and (3) That the acts complained of either are or will result in actual or substantial

injury. Tyler Pipe Industries, Inc. v. Dept. of Revenue, 96 Wn.2d 785, 638 P.2d 1213 (1982); Federation of State Employees v. State, 99 Wn.2d 878, 665 P.2d 1337 (1983). The purpose of a preliminary injunction is to preserve the status quo until trial can be had on the merits. McLean v. Smith, 4 Wn. App. 394, 482 P.2d 798 (1971). In order to prove a "clear legal right", the moving party must prove likelihood of prevailing on the merits. Federal Way Family Physicians, Inc. v. Tacoma Stands Up for Life, 106 Wn.2d 261, 721 P.2d 946 (1986).

The Plaintiff maintains that unless injunctive relief is granted, it will suffer immediate and ongoing deprivation of free speech rights, as well as economic injury. The federal courts have held that deprivation of First Amendment rights for even minimal periods of time constitutes a sufficient showing of threatened injury to justify issuance of a preliminary injunction. Elrod v. Burns, 427 U.S. 347, 49 L. Ed. 2d 547, 96 S. Ct. 2673 (1976), Citizens for a Better Environment v. City of Parkridge, 567 F.2d 689 (7th Cir. 1975). In addition, deprivation of First Amendment rights, coupled with economic injury, has been held to be a sufficient showing of immediate or irreparable injury to justify issuance of a preliminary injunction. Doran v. Salem Inn, Inc., 422 U.S. 922, 932, 45 L. Ed. 2d 648, 95 S. Ct. 2561 (1975).

Unless temporary relief is granted, the Plaintiff Factoria Center Investments will suffer injury that it will not be able to operate its business or exercise its free speech rights. Discussion of the likelihood of success on the merits is contained in the following portion of this motion.

B. Overview of applicable law.

Topless or nude dancing is a form of speech which is at least minimally protected under the First Amendment to the United States Constitution. Barnes v. Glen Theater, Inc., 501 U.S. ___, 115 L. Ed. 2d 504, 111 S. Ct. 2456 (1991); O'Day v. King County, 109 Wn.2d 796, 749 P.2d ___ (1988).

Courts have analyzed licensing schemes similar to the one involved in this case in terms of whether or not they constitute an impermissible prior restraint of freedom of speech. FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 107 L. Ed. 2d 603, 110 S. Ct. 596 (1990). A licensing requirement raises first amendment concerns when it inhibits the ability or inclination to engage in protected expression. KEV v. Kitsap County, 793 F.2d 1053, 1059 (9th Cir. 1986).

A prior restraint is a restraint of speech in advance of dissemination or in advance of a judicial determination that the speech is protected by the First Amendment. Tribe, American Constitutional Law, § 12-34 (2d ed.). Not all prior restraints violate the First Amendment, but they come into court bearing a heavy presumption against their constitutionality. Freedman v. Maryland, 380 U.S. 51, 13 L. Ed. 2nd 649, 85 S. Ct. 734 (1965). There are two primary evils associated with primary restraints. FW/PBS Inc. v. City of Dallas, supra. The first is a scheme that places unbridled discretion in the hands of a governmental official or agency. Id. And see also Staub v. City of Baxley, 355 U.S. 313, 2 L. ed. 2d 302, 78 S. Ct. 277 (1958). The second is where the licensing scheme doesn't take place "under procedural safeguards designed to obviate the dangers of a censorship system". Freedman, supra, at 58. The essential safeguards are: (1) the licensing official must be required to issue or deny a license within a reasonable period of time, and

(2) there must be a provision for prompt judicial review. FW/PBS v. City of Dallas, supra.

License requirements such as the one involved in this case are also analyzed under the principals applicable to time, place and manner restrictions. Acorn Investments, Inc. v. City of Seattle, 887 F.2d 219 (9th Cir. 1989); Adult Entertainment v. Pierce County, 57 Wn. App. 435, 788 P.2d 1102 (199). Under the First Amendment, time, place and manner restrictions are constitutional if they are narrowly tailored to further a substantial governmental interest and afford reasonable alternative channels of communication. City of Renton v. Playtime Theater, Inc., 475 U.S. 41, 89 L. Ed. 2d 29, 106 S. Ct. 925 (1986).

Article 1 Section 5 of the Washington Constitution provides greater protection for freedom of speech than the First Amendment. Bearing v. Share, 106 Wn.2d. 212, 234, 721 F.2d 918 (1986). Time, place and manner restrictions must be narrowly tailored to serve a "compelling" governmental interest. Id.

C. The licensing provisions of ordinances 4692 and 4735 are invalid because they fail to specify what the qualifications are for obtaining a license.

Four different kinds of licenses are required by Ordinances 4692 and 4735. A "cabaret" license is required under subsection (A) of 5.08.040 for businesses which are defined in BCC § 5.08.010(E) as a "cabaret". Businesses defined as "adult cabarets" are required to be licensed under subsection (B) of 5.08.040. Persons who work in "adult cabarets" as "managers" or "entertainers" are required to be licensed under subsection (C) of 5.08.040. BCC § 5.08.030

sets forth general qualifications applicable to all licensees. It provides:

> No license shall be issued to:
>
> A. A natural person who has not attained the age of twenty-one years, except that licenses may be issued to persons who have attained the age of eighteen years with respect to cabarets where no intoxicating liquors are served or provided.
>
> B. A person whose place of business is conducted by a manager or agent, unless such manager or agent possesses the same qualifications required of the licensee, or in the case of a manager or an adult cabaret, the manager has obtained a manager's license.
>
> C. A co-partnership, unless all the members thereof are qualified to obtain a license as provided in this chapter. Such license shall be issued to the manager or agent thereof.
>
> D. A corporation, unless all the officers and directors thereof are qualified to obtain a license as provided herein. Such license shall be issued to the manager or agent thereof.

Other than the general qualifications set forth in 5.08.030, Ordinance 4692 and 4735 permit the City Clerk to issue or deny licenses for adult cabarets, managers and entertainers based upon standards which are completely vague and undefined. For example, with respect to the adult cabaret license, BCC § 5.08.040(B)(8) provides in the pertinent part:

> Upon receipt of the complete application and fee, the clerk shall provide copies to the police, fire, and community development department for their investigation and review to determine compliance of the proposed adult cabaret with the laws and regulations which each department administers. Each Department shall, within thirty day of the date of such application, inspect the application and premises and shall make a written report to the clerk whether such application and premises complies with the laws administered by each department. No license shall be issued unless each department reports that the application and premises comply with the relevant laws.

(Emphasis supplied).

Under the subsection quoted above, the Clerk is free to deny an adult cabaret license based upon a determination that the business fails to comply with "relevant laws", but there is not indication in the text of the ordinance as to what the laws might be.

Similarly, subsection (B) (9) of 5.08.040 provides:

> An adult cabaret license shall be issued by the clerk within thirty days of the date of filing a complete license application and fee, unless the clerk determines that the applicant has failed to meet any of the requirements of this chapter or provide any information required under this subsection or that the applicant has made a false, misleading or fraudulent statement of material fact on the application for a license.

(Emphasis supplied).

Under the subsection quoted above, the Clerk is free to deny an adult cabaret license based upon non-compliance with "any of the requirements of this chapter," but there is no indication elsewhere as to what the requirements are. Similar language is also found in the section dealing with the issuance of denial of licenses for managers and entertainers. BCC § 5.08.040(C)(3) provides:

> An adult manager's or adult entertainer's license shall be issued by the clerk within 14 days from the date the complete application form and fee are received unless the clerk determines that the applicant has failed to provide any information required to be supplied according to this chapter, has made any, false, misleading or fraudulent statement of material fact in the application, or has failed to meet any of the requirements for issuance of a license under this chapter.

Statutes which authorize public officials to license conduct protected by the First Amendment must set forth definite, objective guidelines for the issuance of such licenses. Entertainment Concepts v. Maciejewski, 631 F.2d 497 (7th Cir. 1980); Perrine v. Municipal Court, 5 Cal. 3d 656, 97 Cal. Rptr. 320, 488 P.2d 648 (1971); Ebel v. City of Garden Grove, 120 Cal. App. 3d 399, 176 Cal. Rptr. 312 (1981); Seattle v. Bittner, 81 Wn.2d 747, 505 P.2d 126 (1973). Statutes which do not contain adequate standards and thereby vest licensing officials with unfettered discretion to issue or deny a speech related license are impermissible prior restraints.

This is not a case of inadequate standards, but simply no standards at all. The Bellevue City Code provides that the Clerk may refuse to issue an adult cabaret license if the

applicant fails to comply with "any requirements of this Chapter," or if applicant fails to comply with "relevant laws," but the Clerk has unlimited discretion to decide what those requirements or "relevant laws" might be.

D. The licensing provisions of Ordinance 4692 and 4735 are invalid because they require disclosure of extensive amounts of information which is unrelated to the qualifications to obtain a license.

The Plaintiff incorporates by reference the argument in the preceding section that there are essentially no requirements specified in the Bellevue City Code for issuance or denial of licenses for adult cabarets, managers and entertainers.

Bellevue City Code § 5.08.040 requires applicants for the adult cabaret, managers and entertainers licenses to submit a lengthy and detailed license application which requires the disclosure of information which has nothing to do with any qualifications to obtain a license. For example, subsection (B)(1)(b) requires disclosure as to whether or not a general partnership or corporation is in good standing under the laws of Washington although this has nothing to do with qualifications to obtain a license. Subsections (B)(1)(c) and (d) require disclosure of the applicant's interests in any other sexually oriented business, and disclosure of whether or not the applicant has ever had a license suspended or revoked, although this information has nothing to do with qualifications to obtain a license. Subsection (B)(1)(e) requires disclosure of prior criminal convictions, and forfeitures, other than minor traffic infractions, although the applicant may not be disqualified from obtaining a license on these grounds.

Compelled content-neutral disclosure of owner and employee information can chill protected expression. Taller v. California, 362 U.S. 60, 64, 4 L. Ed. 2d 559, 80 S. Ct. 536, 538-539 (1960); NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 461-462, 2 L. Ed. 2d 1488, 78 S. Ct. 1163, 1171-72 (1957). This chill can occur even if suppressing particular expression is unintended. NAACP, supra, at 461. Compelled disclosure of information in connection with an adult entertainment licensing ordinance cannot stand if the information sought is not reasonably related to the furtherance of a legitimate and substantial governmental interest. Acorn Investments, Inc. v. City of Seattle, 887 F.2d 219, 226 (9th Cir. 1989); Genusa v. Peoria, 619 F.2d 1203 (7th Cir. 1980).

In Genusa v. Peoria, supra, the Court struck down portions of an adult bookstore licensing ordinance which required the disclosure of information which is substantially the same as that required by the Bellevue ordinance, for the reason that there was an invasion of the Plaintiff's privacy without any legitimate justification. 619 F.2d 1202, 1203. The information that was sought by the ordinance in that case, which was held to be unjustified, included all residences for the past three years, prior license history, a statement as to whether a license had previously been suspended or revoked, prior criminal convictions, and a list of officers and shareholders. Id. For the same reason, a shareholder disclosure requirement was held to be unconstitutional in Acorn Investments v. City of Seattle, supra.

The reasoning in Acorn Investments was implicitly adopted by the Washington Supreme Court in World Wide Video v. City of Tukwila, 117 Wn.2d 382, 816 P.2d 18 (1991). In that case, the ordinance required disclosure of the names and address of persons holding "an ownership,

leasehold or other interest", in the business. Recognizing that this broad language presented a potential constitutional defect under Acorn, the Court avoided the infirmity by construing the phrase "or other interest" to mean a "significant interest", with significance based upon responsibility for management of the business. Id. at 392.

Bellevue City Code § 5.08.040 requires disclosure of a great deal of information which is unrelated to the qualifications to obtain a license, and which cannot otherwise be justified by any substantial governmental interest. This includes the information which is sought by the following subsections: (B)(1)(a), (b), (c), (d), (e), (f) and (j). As to managers and entertainers, it includes the information required by subsections (C)(1)(d). In essence, the complex and detailed license application is a trap for the unwary, in that it provides pretext to deny issuance of a license on the ground that the application contains false or misleading information. The defendant should be restrained from enforcing these portions of its ordinance.

F. Ordinance 4692 fails to contain reasonable time limits for issuance or denial of a managers license

BCC 5.08.040C(3) provides:

> An adult cabaret manager's or an adult entertainer's license shall be issued by the clerk within 14 days from the date of the complete application and fee were received unless the clerk determines that the applicant has failed to provide any information required to be supplied according to this chapter, or that the applicant has made any false, misleading or fraudulent statement of material fact in the application for a license. The clerk may grant the applicant an

> extension of time in which to supply the required information. If the clerk determines that the applicant has failed to meet any of the requirements for issuance of a license under this subsection, the clerk shall deny the application in writing and shall cite the specific reasons therefor, including applicable laws. If a request for extension of time is not made, and the clerk has failed to approve or deny the license within fourteen days of filing of a complete application for an adult cabaret manager's license, the applicant may, subject to all other applicable laws, commence work as an adult cabaret manager in a duly licensed adult cabaret until notified by the clerk that the license has been denied. An applicant for an adult entertainer's license shall be issued a temporary license upon receipt of a complete license application and fee. Said temporary license will automatically expire on the fourteenth day following the filing of a complete application and fee, unless the clerk has failed to approve or deny the license application in which case the temporary license shall be valid until the clerk approves or denies the application, or until the final determination of any appeal from a denial of the application.

BCC § 5.08.040(C)(4) authorizes issuance of a temporary entertainer's license immediately upon application, which remains in effect for fourteen days. However, there is no similar provision for issuance of a manager's license. Hence, even though the qualifications for issuance of manager's license are no different than the qualifications for issuance of an entertainer's license, there is a fourteen day waiting period with respect to the manager's license only.

FW/PBS Inc. v. City of Dallas, supra, provides that a speech related license must be issued or denied within a reasonable period of time in order to avoid invalidation on the grounds that it constitutes an impermissible prior restraint. In KEV Inc. v. Kitsap County, 793 F.2d 1053, 1060 (9th Cir. 185), the Court of Appeals struck down a portion of a licensing scheme similar to this one which provided for a five day waiting period for issuance of an entertainer's license. The Court held that the five day waiting period unreasonably prevented the exercise of the First Amendment rights because the County provided no justification for the waiting period. Id. Similarly, in this case, there can be no justification for the fourteen day waiting period for issuance of manager's license because: (1) there are essentially no qualifications for issuance of a manager's license other than that the person be twenty one years old; and (2) there is no similar delay with respect to issuance of an entertainer's license even though the requirements for licensing managers and entertainers are the same.

In the absence of any reasonable justification, the fourteen day waiting period for issuance or denial of a manager's license constitutes an impermissible prior restraint.

F. The thirty lux illumination standard and the four clear distance requirements constitute invalid time, place and manner restrictions under First Amendment guidelines.

Bellevue Municipal Code § 5.08.070(A)(6) provides:

> No employee or entertainer mingling with members of the public shall conduct any dance, performance or exhibition in or about the non-stage area of the adult cabaret unless that dance, performance or exhibition is

performed at a distance of no less than four feet from any member of the public.

The Plaintiff's business is intended to feature stage dancing and table dancing by female entertainers. The female entertainers are not employees of the business, but are engaged in their own business, which consists of performing table dances for individual patrons. Typically, the entertainers do not charge for the stage dances, but only for table dances. They are compensated directly by the customers and pay rent to the business in return for the use of the dressing room and performance areas. The table dances are unique performances intended to create a sense of intimacy between the entertainer and the individual patron for whom the dance is performed. The manner in which table dances are performed and the entertainers are compensated is not unique to the City of Bellevue, but exists as the custom and practice of the industry.

The four foot clear distance requirement contained in subsection (A)(6) presumably was adopted to prevent illegal contact between the patrons and entertainers, while the entertainers are performing table dances. However, the ordinance goes beyond requiring physical separation between the entertainer and the patron who is the recipient of the table dance; it also requires a four foot separation between the entertainer and "any member of the public". This language in the ordinance has the unintended consequence of drastically reducing the number of entertainers and patrons who may be accommodated in the assembly area of the business because it requires a moving circle of clear space, with a four foot radius, around each entertainer. Indeed, the reduction in patrons and entertainers required by this provision in the ordinance is so drastic as to prevent the business from operating. In addition, the four foot clear distance

requirement is a restriction on the content of expression because the sense of intimacy and the personal nature of the dance, which the performer attempts to convey, is significantly less effective if the performer is separated by four feet from her intended audience.

Licensing restrictions of this nature are analyzed under the principals applicable to time, place and manner restrictions. Acorn Investments v. City of Seattle, supra, Adult Entertainment Center v. Pierce County, 57 Wn. App. 435, 788 P.2d 1102 (1990). Under the First Amendment, time, place and manner restrictions are valid if they are content neutral, if they are narrowly tailored to further a substantial governmental interest, and if they afford reasonable alternative channels of communication. City of Renton v. Playtime Theater Inc., 475 U.S. 41, 89 L. Ed. 2d 29, 106 S. Ct. 925 (1986).

An ordinance is deemed to be content neutral if it is justified without reference to the content of the speech. City of Renton, supra, at 47. However, an ordinance may be deemed to be content based rather than content neutral if the "predominate purpose" of enactment was the suppression of constitutionally protected speech. Id. at 48. The determination of whether an ordinance is content based rather than content neutral is fact specific and turns on whether or not there is sufficient evidence in the legislative record to justify the restriction imposed. Walnut Properties v. City of Whittier, 808 F.2d 1311 (9th Cir. 1986).

The government bears the burden of establishing that its time place and manner restriction is "narrowly tailored" to further a substantial governmental interest and that it leaves open, "ample alternative channels of communication." Ward v. Rock Against Racism, 491 U.S. 781, 105 L. Ed. 2d 661,

109 S. Ct. 2746 (1989). An ordinance is not narrowly tailored if it burdens substantially more speech than is necessary to further the government's legitimate interest. Id. There must be a "reasonable fit" between the legislative end and the means chosen by government to accomplish that end. Board of Trustees SUNY v. Fox, 492 U.S. 469, 106 L. Ed. 2d 388, 109 S. Ct. 3028 (1989). On a number of occasions, Courts have invalidated time, place and manner ordinances where the restrictions imposed by the legislation were broader than necessary to accomplish the intended legislative goals. Acorn Investments, Inc. v. City of Seattle, supra, at 221, Tollis Inc. v. San Bernardino County, 827 F.2d 1329 (9th Cir. 1987); World Wide Video v. Tukwila, supra, at 388-390.

In this case, the four foot clear distance requirement of subsection (A)(6) goes beyond prohibiting physical contact between entertainers and patrons who are the recipients of table dances. It requires an artificial and unnecessary clear distance between entertainers and "any member of the public," which drastically reduces the number of entertainers and patrons that the business may accommodate. It also imposes an unnecessary restraint on the content of the entertainers' expression by preventing them from using physical proximity as a means of creating a sense of intimacy and personal rapport with their customers. For these reasons, the Defendant is not in a position to demonstrate that its restriction is "narrowly tailored" to further a substantial governmental interest, or that it leaves open ample alternative channels of communication. The evidence to be presented at the show cause hearing will also demonstrate that the ordinance is content based rather than content neutral because it was adopted entirely at the insistence of an organization known as Washington Together Against Pornography, a pro-censorship organization.

G. The four foot clear distance requirement is an invalid time, place and manner restriction under Article 1, Section 5 of the Washington Constitution.

1. In this case, Article 1, Section 5 of the Washington Constitution confers greater protection than the First Amendment.

Nude expression is protected speech under Article 1 § 5 of the Washington Constitution. O'Day v. King County, 109 Wn.2nd 796, 749 P.2d 142 (1988). Generally speaking, Article 1 § 5 of the Washington Constitution is more protective of freedom of speech than the First Amendment. Pre-publication prior restraints are absolutely prohibited by Article 1 § 5 of the Washington Constitution. State v. Coe, 101 Wn.2d 364, 679 P.2d 853 (1984); Bering v. Share, 106 Wn.2d 212, 721 P.2d 918 (1986). Time, place and manner restrictions are measured under the more rigorous compelling governmental interest test, rather than the substantial governmental interest tests, which is applied under the First Amendment. See Bering v. Share, supra., at p. 234; Collier v. Tacoma, 121 Wn.2d 737, 854 P.2d 1046 (1993); Adult Entertainment Center v. Pierce County, 57 Wn. App. 435, 788 P.2d 1102 (1990). Article 1 § 5 of the Washington State Constitution is less tolerant than the First Amendment of overly broad restrictions on speech. O'Day v. King County, supra., at p. 804.

In order to determine in a given situation whether Article 1 § 5 of the Washington Constitution provides greater protection than the Federal Constitution, reference must be had to be six (6) non-exclusive criteria of State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986). See Forbes v. Seattle, 113 Wn.2d 54, 720 P.2d 808 (1986) and Collier v Tacoma,

supra, at p. 7046. The Gunwall factors: 1) The textual language; 2) Differences in text; 3) Constitutional history; 4) Pre-existing state law; 5) Structural differences; and 6) Matters of particular state and local concern. In this case, the Plaintiff maintains that Article 1 § 5 confers greater protection, based upon the following is a discussion of the relevant Gunwall factors:

Textual Language

Article 1 § 5 of the Washington Constitution provides:

> Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right.

One of the fundamental premises of First Amendment cases dealing with nude dancing is that such activity is entitled to only the minimum amount of constitutional protection. See Barnes v. Glen Theater, Inc., 501 U.S. ___, 115 L. Ed. 2d 504, 111 S. Ct. ___ (1991). To a large extent, the federal courts have not been particularly sensitive to restrictions on nude dancing because the right to engage in nude dancing is considered to be a less important constitutional right. However, Article 1 § 5 of the Washington Constitution extends to the right to speak freely, "on all subjects." On at least two occasions, the Washington Supreme Court has rejected any suggestion that sexually-oriented speech is entitled to a lesser degree of constitutional protection than other forms of speech. Northend Cinema v. Seattle, 90 Wn.2d 709, 718, F.N. 6, 585 P.2d 1153 (1978); Worldwide Video v. Tukwila, 117 Wn.2d 382, 390, 810 P.2d 18 (1991).

Differences in Text

The dissent in State v. Reece, 110 Wn.2d 766, 757 P.2d 947 (1988), pointed out:

> This court has held in the most recent cases addressing this issue that the very different language of the two constitutions require giving our constitution a broader interpretation.

110 Wn.2d 788.

Constitutional History

The constitutional history of Article 1 § 5 is discussed in the Reece dissent and in State v. Rinaldo, 36 Wash. App. 86, 673 P.2d 614 (1984). The court in Rinaldo observed that the State Constitutional Convention that was convened in 1899 considered three different free speech provisions and adopted the one that was most protective of speech. The court stated:

> Those hearty frontier lawyers, newspaper people, and their colleagues of the 1899 Constitutional Convention said it as clearly as they possibly could--the right to free speech and press in the State of Washington is a privilege guaranteed to all, and so long as it is not abused, it is absolute. Then to insure that this right would not be tampered with by future legislators or courts, they wrote the privilege into our state constitution.

673 P.2d 618.

Pre-Existing Case Law

In Adult Entertainment Center v. Pierce County, supra., the Court of Appeals, Division II, employed the heightened scrutiny of the compelling governmental interest test to measure the constitutionality of a Pierce County licensing scheme which regulated sexually-oriented motion picture arcades. Adult Entertainment Center was cited with approval in the recent Washington Supreme Court decision, Collier v. Tacoma, supra., at pp. 753, 754. The regulation under consideration in Adult Entertainment Center was very similar to the regulation involved in this case; i.e., it employed licensing and configuration requirements to deal with the so-called secondary effects of sexually-oriented businesses. The court in Adult Entertainment Center determined that heightened scrutiny was the appropriate method of analysis in dealing with adult entertainment licensing regulations, and there is no reason to take a different approach in this case.

Structural Differences

As the majority observed in State v. Reece, the Federal Constitution is grant of enumerated powers, and the State Constitution acts as a limitation on the otherwise plenary powers of government. 110 Wn.2d 780. This means that the Washington Supreme Court has to engage in independent state analysis and confer greater protection where appropriate. It is particularly appropriate for the Washington courts to intervene when the United States Supreme Court has decided to limit federal guarantees in a manner inconsistent with prior pronouncements. 110 Wn.2d 781. Barnes v. Glen Theater, supra., represents a radical departure from previous decisions of various federal courts which held that topless dancing is fully-protected speech under the First Amendment. Chase v. Davelaar, 645 F.2d 735 (9th Cir. 1981); Grand Faloon Tavern, Inc. v. Wicker,

670 F.2d 943 (11th Cir. 1982); Miller v. Civil City of Southbend, 904 F.2d 1081 (7th Cir. 1990); Salem Inn, Inc. v. Frank, 501 F.2d 18 (2nd Cir. 1974). To the extent that Barnes represents an erosion of previously existing constitutional protections, it is particularly appropriate for the Washington courts to adopt independent state analysis.

Matters of Particular State or Local Concern

In Washington, activities of this nature have been traditionally regulated by the municipalities. It is difficult to imagine why there would be a federal interest in this area at all, or why it would not be a matter of exclusively local concern.

The preceding discussions suggests that in this case, Article 1 § 5 of the Washington Constitution provides greater protection than the First Amendment. The Plaintiff maintains that this greater protection should manifest itself in three ways. First, the Court should apply the compelling governmental interest test rather than the less rigorous substantial governmental interest test, which is applied in the federal cases. Secondly, to the extent that the asserted defect in the ordinance is one of overbreadth, this Court should adopt the "less tolerant" approach, which is suggested by the Supreme Court's decision in O'Day v. King County, supra., at p. 804.2. Finally, the court should determine whether or not the restriction contained in subsection (A)(6) of 5.08.070 constitute the "least restrictive means" or accomplishing the asserted legislative goals.

2. The restrictions on table dancing are invalid under Article 1, Section 5 of the Washington Constitution because they are not justified by a compelling governmental interest and they fail

to afford reasonable alternative avenues of communication.

Generally speaking, topless dancing licensing ordinances, such as the one at issue in this case, are analyzed under the principles applicable to time, place and manner restrictions. See BSA, Inc. v. King County, 804 F.2d 1104 (9th Cir. 1986); KEV Inc. v. Kitsap County, 793 F.2d 1053 (9th Cir. 1986); Adult Entertainment Center v. Pierce County, supra. Under Article 1 § 5 of the Washington Constitution, time, place and manner restrictions are valid only if they are content-neutral, are narrowly tailored to serve a compelling governmental interest, and leave open ample alternative avenues of communication. Bering v. Share, supra, at p. 234, Collier v. Tacoma, supra, at p. 747. To achieve a compelling governmental interest, the purpose of the ordinance must be a fundamental one, and the legislation must bear a reasonable relation to that purpose. Collier v. Tacoma, supra, at p. 753. The reasonableness of a time, place and manner restriction is determined by balancing the public interest advanced by the legislation against the restriction of free speech rights. Id. The government has the burden of meeting each element of the time, place and manner test. Id. In determining that there are alternative avenues or communication, the court will consider whether or not these avenues are "practically available." Id. at 759.

In KEV, Inc. v. Kitsap County, supra, the Ninth Circuit upheld a Kitsap County adult entertainment ordinance, which contained restrictions which are somewhat similar to the ordinance involved in this case. The Kitsap County ordinance provided that no dancing was to occur closer than ten feet to the nearest patron, and it also prohibited the direct payment of gratuities to dancers.

793 F.2d 1061. In upholding these restrictions, the Court of Appeals stated:

> The alleged purpose of these requirements is to prevent patrons and dancers from negotiating for narcotics transfers and sexual favors on the premises of erotic dance studio. Separating dancers from patrons would reduce the opportunity for prostitution and narcotics transactions. Similarly, prohibiting dancers and patrons from engaging in sexual fondling and caressing in an erotic dance studio would probably deter prostitution. Preventing the exchange of money between dancers and patrons would also appear to reduce the likelihood of drug and sex transactions occurring on regulated premises.
>
> Further, these regulations do not significantly burden First Amendment rights. While the dancers' erotic message may be slightly less effective from ten feet, the ability to engage in protected expression is not significantly impaired. Erotic dancers still have reasonable access to their market. See Ellwest Stereo Theaters, 681 F.2d 1246, (regulation did not affect access to adult films). Similarly, while the tipping prohibition may deny the patron one means of expressing pleasure with a dancer's performance, sufficient alternative methods of communication exist for the patron to convey the same message. Thus, the regulations of reasonable time, place and manner restrictions, that only slightly burden speech.

793 F.2d 1061, 1062.

There are several reasons why the KEV case is distinguishable. First, it was based upon the First

Amendment rather than the broader protection of Article 1 § 5 of the Washington Constitution. Secondly, the plaintiff in that case apparently made no showing as to the impact of the regulation on protected speech. There was no demonstration by the plaintiff in that case that compliance with the ten-foot set-back requirement would interfere with the dancer's erotic message and compromise the quality of the performance. The court in KEV did not understand that the dancer's "market" consisted of the patrons and thus, the regulation would deny reasonable access to the market. The court in KEV erroneously assumed that the money that dancers received from patrons was extra income or "tips," and not their principal source of revenue.

The plaintiffs challenged a stage requirement in the King County ordinance in O'Day v. King County, supra. The court in O'Day declined to analyze this portion of the ordinance as a time, place and manner restriction because of the lack of any showing that the ordinance impacted protected speech. The Washington Supreme Court stated:

> Before we consider whether the stage requirement is a valid time, place and manner restriction, we must determine whether it regulates protected expression or whether it regulates only conduct. Pure conduct does not enjoy the protections of either Article 1 § 5 or the First Amendment. Seattle v. Buchanan, 90 Wn.2d 584, 584 P.2d 918 (1978).
>
> Unlike similar local regulatory regimes that have been invalidated, the stage requirement does not prohibit nude entertainment. (Cites omitted). The stage requirement allows any type of expression by nude entertainers as long as the nude expression is made in minimal distance from patrons.

> Respondents have failed to demonstrate how the stage requirement infringes on their right to free expression rather than simply their conduct. (Cite omitted). The requirement is aimed not at expression, but only public sexual contact between entertainers and patrons by keeping nude entertainers out of reach of the nearest patron. (Cite omitted). We conclude that the eighteen inch stage requirement of K.C.C. 6.08.050(A)(6) regulates only conduct, and not expression protected by Article 1 § 5.

109 Wn.2d 809, 810.

The critical distinction between the ordinance in this case and the King County ordinance considered in O'Day is that the King County ordinance did not completely ban table dancing, but only nude table dancing. The set-back requirement in the King County ordinance does not apply to dancers who are clothed. Finally, the plaintiff in O'Day made no showing that the set-back requirement would adversely impact and diminish the quality of protected speech, nor was there any showing that the King County Ordinance under consideration in O'Day would prevent the dancers from making a living.

The Bellevue ordinance involved in this case is also similar to a Snohomish County ordinance that was challenged in 1987 in the King County Superior Court under Article 1 § 5 of the Washington Constitution. The name of that case was Treshea M. Davis v. Snohomish County, King County Cause No. 87-2-01335-9, consolidated with PD&MK v. Snohomish County, King County Cause No. 87-2-04201-4. The trial in that matter was held before the Honorable Susan Agid, who is now on the Washington Court of Appeals,

Division I. Judge Agid's findings and judgments are attached to this Memorandum and incorporated by reference herein. In the Davis case, the Snohomish County ordinance required licenses for "erotic dance studios" and "erotic dancers" and the definition of those phrases in the Snohomish County ordinance is similar to the definitions contained in the current Bellevue Ordinance. See Findings of Fact and Conclusions of Law, p. 5. The Snohomish County ordinance provided that "erotic dancing" would occur only on a stage eighteen inches off the ground and six feet from the nearest customer. Findings of Fact and Conclusions of Law, pp. 5, 6.

In her findings in the Davis case, Judge Agid observed that a principal distinction between the Snohomish County ordinance and the Kitsap ordinance under consideration in Kev is that the Kitsap ordinance applied to "all dancing," whereas the Snohomish County ordinance applied to only "erotic dancing." Findings of Fact and Conclusions of Law, at p. 8. Judge Agid agreed with the plaintiffs that the phrase "erotic dancing" was vague in that it failed to provide adequate guidance to law enforcement officials. However, she solved the vagueness problem through judicial construction. Findings of Fact and Conclusions of Law, at p. 9. The judicial construction consisted of limiting the phrase "erotic dancing" to certain core behavior, which included:

(a) Nudity;

(b) Displaying or exposing, with less than full opaque covering, that portion of the female breast below the upper edge or the areola;

(c) Displaying or exposing, with less than full opaque covering, the dancer's public area, pubic hair, or anus;

(d) Any dancer fondling or caressing any patron, or an patron fondling or caressing any dancer;

(e) A dancer touching herself on the breast, pubic area, or anal area, or allowing a patron or other dancer to touch her in those areas;

(f) Simulating, by touching or otherwise, masturbation or intercourse;

(g) Bringing any portion of the dancer's body closer than six inches to the patron or rubbing any portion of the dancer's body on a patron;

(h) Sitting on a patron's lap or separating a patron's legs.

Findings of Fact and Conclusions of Law, at p. 10.

In her findings, Judge Agid concluded that once the phrase "erotic dancing" was given the narrowing construction described above, the legislative record was devoid of any evidence that non-erotic dancing caused the so-called adverse secondary effects that were the reason for enactment of the ordinance. Finding of Fact No. 30 provides:

> The regulations of Chapter 6.25 SCC formulated by the County Council were based upon the secondary effects of erotic dancing, as defined by the core activity described above, and not on secondary effects of non-erotic dancing.

Finding of Fact No. 31 provides:

> The County Council did not find that there was a nexus between prostitution, drug dealing and crime problems and non-erotic dancing. Based upon the evidence, the Court cannot find that such a nexus exists.

Finding of Fact No. 32 provides:

> There was not sufficient evidence to establish a nexus between tipping for non-erotic table dancing and the evils that Snohomish County seeks to prevent by regulating erotic dancing.

Since restrictions on non-erotic dancing could not be justified by the reasons for enactment of the ordinance, Judge Agid determined that the ordinance would be overbroad as applied to non-erotic dancing. Finding of Fact No. 35 provides:

> Under the analysis set out in Conclusion of Law No. 13, the regulations at issue are content neutral. They are aimed at the way that dancers and management have conducted themselves in exercising their free speech rights (e.g., dirty dances, assaultive behavior, drug and prostitution deals) and not at the content of the dance itself. While the restrictions are aimed only at erotic dancers, they are justified by the secondary effects of the erotic dance in the clubs at which it takes place. A restriction that was similar to this, that applied to all dancing in Snohomish County, including that which was not shown to have the secondary effects of disruptive or illegal conduct, would be overbroad.

(Emphasis supplied).

In the findings and in the judgment, Judge Agid did not rule that the six-foot setback requirement was unconstitutional because, under the narrowing construction, it did not apply to dancing which did not involve the core behaviors associated with adverse secondary effects. Following entry of the judgment in the Davis case, Snohomish County elected not to appeal, but instead amended its ordinance to incorporate Judge Agid's decision. As revised, Snohomish County Code § 6.01.010(25) defines "erotic dance" and "erotic dancing" to encompass only the so-called core behaviors that are set forth in Judge Agid's decision.

Lacking an authoritative judicial construction, such as the one adopted by Judge Agid, the provisions in the Bellevue ordinance, which impose a four-foot set-back requirement on "all dancing" are overly broad. The legislative record is devoid of any evidence that all dancing, regardless of its content, will cause the secondary effects which are the reason for the enactment of the ordinance. Analyzing the issue under the principles set forth in Collier v. Tacoma, supra, the ordinance in its present form does not serve a compelling governmental interest because the restrictions imposed by the legislation are not justified by the legislative purpose. In a similar vain, the Washington Supreme Court in Worldwide Video v. Tukwila, supra, ruled that a set of zoning restrictions that applied to retail only adult businesses were not narrowly tailored to serve a significant governmental interest because there was no indication in the legislative record that retail-only adult businesses would cause the same adverse secondary effects as those which had facilities for on-premises viewing. Also, in this case, the legislation is defective because the defendant is not in a position to sustain its burden of demonstrating the availability of alternative

avenues of communication. The plaintiffs have made a preliminary showing that revenue from table dancing is the primary source of income for the business and the dancers, and the industry as a whole is dependent on table dancing. Thus, the Defendant is not in a position to demonstrate that alternative avenues or communication are "practically available."

3. The four-foot clear distance requirement is an invalid time place and manner restriction because it does not constitute the "least restrictive means" for attaining the goals of the legislation.

A statute which burdens the exercise of a fundamental right is subject to "strict scrutiny." Dunn v. Blumstein, 405 U.S. 330, 343, 31 L. Ed. 2d 274, 92 S. Ct. 995 (1972); Darrin v. Gould, 85 Wn.2d 859, 540 P.2d 882 (1975); Duranceau v. Tacoma, 27 Wn. App. 770, 620 P.2d 533 (1980). Under the strict scrutiny test, the government must prove that 1) a compelling state interest exists to justify the legislation; and 2) the regulation constitutes the least restrictive means to accomplish the government's objective. First Covenant Church v. Seattle, 114 Wn.2d 393, 402, 787 P.2d 1352 (1990).

In this case, the Defendant is not in a position to demonstrate that the four-foot clear distance requirement is the least restrictive means capable of attaining the legislative goals. For one thing, there is no reason why the entertainer would have to be set back four feet from persons who are not receiving the table dance. Furthermore, the City is not in a position to demonstrate that a lesser distance would not be just as effective in preventing illegal contact between entertainers and patrons. The Plaintiff is prepared to present

evidence that at the City council session which was considering the enactment or Ordinance 4692, Bellevue City Attorney Dick Andrews testified that the City would be able to accomplish its legislative goals with a one-foot setback requirement, and the four-foot clear distance requirement was not the "least restrictive means."

VI.
CONCLUSION

The Court should issue the temporary restraining order and order to show cause requested by the Plaintiff.

DATED this ____ day of February, 1995.

[Filed 2/17/95, unsigned and undated.]
GILBERT H. LEVY, WSBA No. 4805
Attorney for Plaintiff

Supreme Court, U.S.
FILED
DEC 30 1997
CLERK

(3)

No. 97-858

In The

Supreme Court of the United States

October Term, 1997

INO INO, INC., RHONDA REMUS, ESMERALDA SILVA, VICTORIA MCKNIGHT, and DEJA VU-BELLEVUE, INC.,

Petitioners,

v.

CITY OF BELLEVUE, WASHINGTON,

Respondent.

On Petition For Writ Of Certiorari To The Washington Supreme Court

PETITIONERS' REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

Reply to Argument That There Is No Federal Issue Raised By The Award Of Attorney's Fees.

In regard to the issue of whether Washington's rule awarding fees to the defendant is preempted by Title 42 United States Code § 1988, Respondent's reply completely mischaracterizes the record. Respondent stated that Petitoner Ino Ino asserted its claims primarily under the Washington Constitution. *See*, Respondent's Brief in Opposition at 5. Respondent stated that Petitoner did not obtain temporary relief under federal law. *Id.* at 6. Respondent stated that, "there is very serious doubt that federal law had anything to do with the trial court's decision to grant and then vacate equitable relief". *Id.* at 9. None of these representations are correct.

In the complaint, Plaintiff pleaded federal constitutional claims as well as state constitutional claims. *See*, Appendix to Petition at 107-114. The motion for a temporary restraining order sought to restrain the "four foot rule" on federal constitutional grounds, or, alternatively, on state constitutional grounds. *See*, Appendix to Respondent's Brief in Opposition at 19-37. In claiming that the "four foot rule" violated the First Amendment, Petitioners cited this Court's decision in *City of Renton v. Playtime Theater, Inc.*, 475 U.S. 41, 89 L. Ed. 2d 29, 106 S. Ct. 925 (1986), as well as other federal cases. *Id.* at 21, 22. There is no indication in the Order Granting Temporary Relief that the trial court relied on state rather than federal law. *See*, Appendix to Petition at 164. The trial court's findings upholding the Ordinance discussed both federal and state cases and did not differentiate between

federal and state constitutional claims. *Id.* at 83 through 94. The opinion of the Washington Supreme Court noted that Petitioners claimed that the Ordinance violates federal and state constitutions. *Id.* at 8.

Assuming that the suggestion that the Petitioners' lawsuit was "primarily" based on state law is a reasonable basis for allowing Washington to apply its "no fault" fee shifting rule in lieu of Title 42 United States Code § 1988, that claim is simply not borne out by the record. There is nothing in the record to indicate that this was anything other than a civil rights lawsuit, properly filed in state court, which relied on both federal and state constitutional claims.

To an extent, Respondent is correct in suggesting that the two lower court cases cited by Petitioners do not provide clear precedent for the preemption claim. *See,* Opposition at 6-8. On the other hand, Respondent has not cited any cases which directly provide to the contrary. The two cases mentioned in the Opposition, *Blue v. Department of the Army*, 914 F. 2d 525 (4th Cir. 1990), and *Del Rio v. Jetton*, 55 Cal. App. 4th 30, 63 Cal. Rptr. 2d 712 (Cal. App. 2 Dist. 1997), deal with Federal Civil Rule 11 sanctions, or with malicious prosecution, wherein the standard for awarding fees to the the Defendant is similar to the standard for awarding fees to the Defendant under Title 42 United States Code § 1988, which is that the suit was vexatious, frivolous, or brought to harass. *Hensley v. Eckerhart*, 461 U.S. 424, 76 L. Ed. 2d 40, 103 S. Ct. 1933 (1983). Thus, in the cases cited by Respondent there is no inconsistency between the countervailing fee shifting rule and the congressional policy underlying § 1988, which would provide the basis for a preemption claim.

The absence of any clear precedent from the lower courts should serve to illustrate that this is an unsettled area of the law which requires prompt and ultimate determination by this Court.

CONCLUSION

The Writ of Certiorari should be issued to the Washington Supreme Court.

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